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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF MONTANA**

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**FROM JANUARY 24, 1916, TO NOVEMBER 10, 1916**

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**OFFICIAL REPORT**

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**VOLUME 52**

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**SAN FRANCISCO**  
**BANCROFT-WHITNEY COMPANY**  
**1916**

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**JUSTICES**  
**OF**  
**THE SUPREME COURT OF THE STATE OF MONTANA,**  
**DURING THE TIME OF THESE REPORTS.**

\*THE HON. THEO. BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER, } Associate Justices.

THE HON. WILLIAM L. HOLLOWAY, }

**OFFICERS OF THE COURT:**

JOSEPH B. POINDEXTER, Attorney General.  
W. H. POORMAN, Asst. Attorney General.  
J. H. ALVORD, Asst. Attorney General.  
CHAS. S. WAGNER, Asst. Attorney General.  
†JAMES T. CARROLL, Clerk.  
MARSHALL N. RACE, Marshal.  
AUGUST C. SCHNEIDER, Court Stenographer.

\*Re-elected November 7, 1916.

†Elected November 7, 1916, to succeed himself, after appointment.





## **ATTORNEYS AND COUNSELORS AT LAW.**

Admitted from April 25, 1916, to December 4, 1916.

**ABBOTT, ETHEL S.**, October 9, 1916.

**AMUNDSON, M. H.**, October 30, 1916.

**BACHELLER, E. PAUL**, June 12, 1916.

**BACHELLER, HAROLD I.**, June 12, 1916.

**BAKER, EDGAR J.**, July 6, 1916.

**BEISEKER, M. H.**, July 8, 1916.

**BENTLEY, CLINTON H.**, July 17, 1916.

**BODEN, H. B.**, July 18, 1916.

**BROWN, LEONARD A.**, June 12, 1916.

**BROWN, B. LEWIS**, July 12, 1916.

**BUFFINGTON, J. P.**, October 6, 1916.

**CAROLAN, T. W.**, July 28, 1916.

**CAVAN, JOHN J.**, May 29, 1916.

**CLACKSIN, EDWIN A.**, November 27, 1916.

**COFFEY, RICHARD J.**, September 18, 1916.

**CONLEY, EDWARD J.**, May 1, 1916.

**CRAWFORD, ISAAC S.**, June 12, 1916.

**CUMMINS, EDWIN J.**, June 12, 1916.

**DAVIS, THOS. E.**, July 19, 1916.

**DELANCY, JOHN V.**, October 16, 1916.

**DE MORSE, PHILIP B.**, September 18, 1916.

**DOYLE, MORGAN J.**, May 19, 1916.

**DRISCOLL, JOHN P.**, September 18, 1916.

**EGLESTON, WILLIS J.**, October 16, 1916.

**FARMER, RALPH M.**, October 16, 1916.

**FEDERLE, HEDWIG E.**, July 25, 1916.

**FELDMAN, M., JOHAN**, September 27, 1916.

**FITZGERALD, JOHN H.**, July 25, 1916.

**FLOOD, CHAS. P.**, May 15, 1916.

**GOLDEN, ABRAM, L.**, June 26, 1916.

**GOODRICH, JOHN A.**, September 27, 1916.

**HANLEY, CLARENCE**, June 12, 1916.

**HAUGE, OSCAR C.**, June 19, 1916.

**HAYDEN, CLYDE**, September 27, 1916.

**HERBERT, WILLIAM T.**, July 13, 1916.

**HILDEBRAND, RAY**, November 13, 1916.

**JESPERSON, CHRISTIAN G.**, September 18, 1916.

**JOHNSON, LLOYD M.**, June 12, 1916.

**KENNEDY, LAWRENCE E.**, October 9, 1916.

**KING, HAROLD W.**, November 1, 1916.

**LEONARD, P. F.**, December 4, 1916.

**LOFGREN, E. E.**, July 10, 1916.

**LONG, PHILIP E.**, July 6, 1916.

**MACLEAN, EDWIN L.**, July 12, 1916.

**MARRON, HUGH N.**, September 27, 1916.

## ATTORNEYS AND COUNSELORS AT LAW.

MATTHEWS, EUGENE F., September 27, 1916.

MCCAY, CHAS. H., September 27, 1916.

MCNAUGHT, A. G., July 8, 1916.

MILLER, BEET H., July 10, 1916.

MURPHY, JOHN P., July 18, 1916.

O'CONNOR, MARR, September 27, 1916.

OTT, JOHN, June 26, 1916.

OWEN, JOHN O., July 10, 1916.

POOLE, W. G., July 11, 1916.

RIGG, PETER M., September 18, 1916.

ROBINSON, LLOYD W., Jr., June 12, 1916.

RUSSELL, CHAS. A., June 26, 1916.

SEAWELL, J. L., October 6, 1916.

SILVER, FRANCIS A., May 29, 1916.

SIMPSON, W. E., May 29, 1916.

STANGELAND, ARTHUR W., May 8, 1916.

STILLMAN, A. D., July 6, 1916.

SULLIVAN, JOHN F., July 10, 1916.

SWEITZER, E. E., September 18, 1916.

THELEN, EDWARD, June 26, 1916.

TOOMEY, EDWARD G., June 26, 1916.

TUCKER, W. SHERMAN, July 15, 1916.

TUBSLER, L. H., May 20, 1916.

WALTON, ERNEST L., July 10, 1916.

WATTS, F. W., November 20, 1916.

WEEKS, ALLAN L., July 1, 1916.

WHITE, D. L., November 27, 1916.

WILSON, CLAUDE W., September 27, 1916.

WILSON, JAMES J., July 18, 1916.

WITTENBERG, DAVID H., July 12, 1916.

YOUNG, DENZIL B., May 8, 1916.

**DIRECTORY**  
**OF THE**  
**JUDICIAL DISTRICTS OF THE STATE OF MONTANA.**  
**1917.**

---

**FIRST JUDICIAL DISTRICT.**

County of Lewis and Clark. County Seat, Helena.  
District Judges: Hon. R. Lee Word; Hon. W. H. Poorman.  
Officers: County Attorney: Lester H. Loble, Esq.  
Clerk of District Court: F. L. Reece.  
Sheriff: Edward J. Majors.

---

**SECOND JUDICIAL DISTRICT.**

County of Silver Bow. County Seat, Butte.  
District Judges: Hon. John V. Dwyer; Hon. J. J. Lynch; Hon.  
J. B. McClernan.  
Officers: County Attorney: Jos. R. Jackson, Esq.  
Clerk of District Court: Otis Lee.  
Sheriff: Jno. K. O'Rourke.

---

**THIRD JUDICIAL DISTRICT.**

Counties of Deer Lodge, Powell and Granite.  
District Judge: Hon. George B. Winston.  
Officers of Deer Lodge County (County Seat, Anaconda):  
County Attorney: David H. Morgan.  
Clerk of District Court: James White.  
Sheriff: L. L. Hartsell.

**Officers of Powell County (County Seat, Deer Lodge):**

County Attorney: W. E. Keeley, Esq.

Clerk of District Court: Robert Midtlyng.

Sheriff: Thos. Mullen.

**Officers of Granite County (County Seat, Philipsburg):**

County Attorney: R. Lewis Brown.

Clerk of District Court: Wm. B. Calhoun.

Sheriff: Fred. C. Burks.

---

**FOURTH JUDICIAL DISTRICT.**

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCulloch;

Hon. Theodore Lentz.

**Officers of Mineral County (County Seat, Superior):**

County Attorney: Ivan E. Merrick.

Clerk of District Court: Ira Nichols.

Sheriff: Chas. Hoffman.

**Officers of Missoula County (County Seat, Missoula):**

County Attorney: Fred. R. Angevine, Esq.

Clerk of District Court: Harry Rawn.

Sheriff: J. T. Green.

**Officers of Ravalli County (County Seat, Hamilton):**

County Attorney: E. C. Kurtz, Esq.

Clerk of District Court: J. T. Coughenour.

Sheriff: Ike Wylie.

**Officers of Sanders County (County Seat, Thompson Falls):**

County Attorney: Wade R. Parks, Esq.

Clerk of District Court: Wm. Strom.

Sheriff: Joseph L. Hartman.

**FIFTH JUDICIAL DISTRICT.**

**Counties of Beaverhead, Jefferson and Madison.**

**District Judges:** Hon. Joseph C. Smith; Hon. W. A. Clark.

**Officers of Beaverhead County (County Seat, Dillon):**

County Attorney: Wilber G. Gilbert, Esq.

Clerk of District Court: Fred Rife.

Sheriff: C. K. Wyman.

**Officers of Jefferson County (County Seat, Boulder):**

County Attorney: J. E. Kelly, Esq.

Clerk of District Court: W. B. Hundley.

Sheriff: T. L. Locker.

**Officers of Madison County (County Seat, Virginia City):**

County Attorney: Geo. R. Allen, Esq.

Clerk of District Court: Matt Carey.

Sheriff: Clarence W. Hungerford.

---

**SIXTH JUDICIAL DISTRICT.**

**Counties of Park, Stillwater and Sweet Grass.**

**District Judge:** Hon. Albert P. Stark.

**Officers of Park County (County Seat, Livingston):**

County Attorney: E. M. Niles, Esq.

Clerk of District Court: Wm. Pethybridge.

Sheriff: A. S. Robertson.

**Officers of Stillwater County (County Seat, Columbus):**

County Attorney: B. E. Berg, Esq.

Clerk of District Court: G. B. Iverson.

Sheriff: Edward B. Fellows.

**Officers of Sweet Grass County (County Seat, Big Timber):**

County Attorney: John B. Selters, Esq.

Clerk of District Court: H. C. Pound.

Sheriff: H. G. Lyons.

**JUDICIAL DISTRICTS OF THE**

**SEVENTH JUDICIAL DISTRICT.**

**Counties of Dawson, Richland and Wibaux.**

**District Judge:** Hon. C. C. Hurley.

**Officers of Dawson County (County Seat, Glendive):**

**County Attorney:** Albert Anderson, Esq.

**Clerk of District Court:** Frank Parrett.

**Sheriff:** Geo. Twibble, Jr.

**Officers of Richland County (County Seat, Sidney):**

**County Attorney:** Carl L. Brattin, Esq.

**Clerk of District Court:** Guy L. Rood.

**Sheriff:** Fred. D. Sullivan.

**Officers of Wibaux County (County Seat, Wibaux):**

**County Attorney:** Geo. P. Jones, Esq.

**Clerk of District Court:** A. E. Jeffers.

**Sheriff:** J. W. Jones.

**EIGHTH JUDICIAL DISTRICT.**

**Counties of Cascade, Teton, and Toole.**

**District Judges:** Hon. Jere B. Leslie; Hon. Harry H. Ewing.

**Officers of Cascade County (County Seat, Great Falls):**

**County Attorney:** Geo. A. Judson, Esq.

**Clerk of District Court:** Geo. Harper.

**Sheriff:** Louis H. Kommers.

**Officers of Teton County (County Seat, Chouteau):**

**County Attorney:** Walter L. Verge, Esq.

**Clerk of District Court:** Paul Jacobson.

**Sheriff:** William Miller.

**Officers of Toole County (County Seat, Shelby):**

**County Attorney:** W. M. Block, Esq.

**Clerk of District Court:** Perry J. Day.

**Sheriff:** J. S. Alsup.

**NINTH JUDICIAL DISTRICT.**

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: C. E. Carlson, Esq.

Clerk of District Court: W. L. Hays.

Sheriff: D. E. Gray.

---

**TENTH JUDICIAL DISTRICT.**

County of Fergus. County Seat, Lewistown.

District Judge: Hon. Roy E. Ayers.

Officers: County Attorney: Stewart McConochie, Esq.

Clerk of District Court: James L. Martin.

Sheriff: John H. Stephens.

---

**ELEVENTH JUDICIAL DISTRICT.**

Counties of Flathead and Lincoln.

District Judge: Hon. T. A. Thompson.

Officers of Flathead County (County Seat, Kalispell):

County Attorney: T. H. MacDonald, Esq.

Clerk of District Court: R. N. Eaton.

Sheriff: J. H. Metcalf.

Officers of Lincoln County (County Seat, Libby):

County Attorney: Benjamin F. Maiden, Esq.

Clerk of District Court: Timothy Miller.

Sheriff: Waverly L. Brown.

## TWELFTH JUDICIAL DISTRICT.

Counties of Blaine, Chouteau and Hill.

District Judge: Hon. John W. Tattan.

Officers of Blaine County (County Seat, Chinook):

County Attorney: D. J. Sias, Jr., Esq.

Clerk of District Court: A. W. Ziebarth.

Sheriff: Jas. Buckley.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: J. A. Kavaney, Esq.

Clerk of District Court: Geo. D. Patterson.

Sheriff: B. B. Crawford.

Officers of Hill County (County Seat, Havre):

County Attorney: V. R. Griggs, Esq.

Clerk of District Court: Geo. W. Glass.

Sheriff: Geo. Bickle.

---

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. Chas. A. Taylor; Hon. A. C. Spencer.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: H. A. Simmons, Esq.

Clerk of District Court: G. L. Finley.

Sheriff: George Headington.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Julian Terrett, Esq.

Clerk of District Court: Frank A. Nolan.

Sheriff: John H. Kifer.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: Jas. L. Davis, Esq.

Clerk of District Court: Fred Inabnit.

Sheriff: S. W. Matlock.



**FOURTEENTH JUDICIAL DISTRICT.**

**Counties of Meagher and Broadwater.**

**District Judge:** Hon. John A. Matthews.

**Officers of Meagher County (County Seat, White Sulphur Springs):**

County Attorney: H. E. Hagerman, Esq.

Clerk of District Court: Geo. H. Bell.

Sheriff: Geo. B. Nagues.

**Officers of Broadwater County (County Seat, Townsend):**

County Attorney: Fred. W. Schmitz, Esq.

Clerk of District Court: Fred Bubser.

Sheriff: Harry A. Crittenten.

---

**FIFTEENTH JUDICIAL DISTRICT.**

**Counties of Rosebud and Musselshell.**

**District Judge:** Hon. Chas. L. Crum.

**Officers of Rosebud County (County Seat, Forsyth):**

County Attorney: F. F. Haynes, Esq.

Clerk of District Court: D. J. Muri.

Sheriff: Henry Grierson.

**Officers of Musselshell County (County Seat, Roundup):**

County Attorney: W. W. Mercer, Esq.

Clerk of District Court: W. G. Jarrett.

Sheriff: Chas. C. Hopkins.

---

**SIXTEENTH JUDICIAL DISTRICT.**

**Counties of Custer, Fallon and Prairie.**

**District Judge:** Hon. Daniel L. O'Hern.

**Officers of Custer County (County Seat, Miles City):**

County Attorney: Frank Hunter, Esq.

Clerk of District Court: C. A. Lindeberg.

Sheriff: Austin B. Middleton.

- Officers of Fallon County (County Seat, Baker):**  
County Attorney: Chas. J. Dousman, Esq.  
Clerk of District Court: Ralph Keener.  
Sheriff: M. E. Jones.
- Officers of Prairie County (County Seat, Terry):**  
County Attorney: Joseph C. Tope, Esq.  
Clerk of District Court: W. A. Cameron.  
Sheriff: W. A. Johnson.
- 

**SEVENTEENTH JUDICIAL DISTRICT.**

- Counties of Phillips, Valley and Sheridan.**  
District Judge: Hon. John Hurly.
- Officers of Phillips County (County Seat, Malta):**  
County Attorney: F. C. Gabriel, Esq.  
Clerk of District Court: C. M. Porter.  
Sheriff: J. R. Crabb.
- Officers of Valley County (County Seat, Glasgow):**  
County Attorney: Carl D. Borton, Esq.  
Clerk of District Court: Walter Shanley.  
Sheriff: C. W. Powell.
- Officers of Sheridan County (County Seat, Plentywood):**  
County Attorney: L. J. Onstad, Esq.  
Clerk of District Court: O. R. Girard.  
Sheriff: Jack Bennett.

## TABLE OF CASES REPORTED—VOL. 52.

Anaconda Copper Min. Co., Inter-State Power Co. v.....	509
Anaconda Copper Min. Co. v. Pilot-Butte Min. Co.....	165
Anaconda Copper Min. Co. v. Ravalli County.....	422
Ayers, State (ex rel. Lindsey) v.....	62
Banking Corporation of Montana v. Hein.....	238
Barrett, First Nat. Bank of Miles City v.....	359
Batch v. Helena Light & Ry. Co.....	517
Berkin v. Healy.....	398
Birch & Sons Construction Co., Glenn v.....	414
Blair v. McElwain.....	617
Board of County Commissioners, Honstain v.....	391
Board of Examiners, State (ex rel. Scollard) v.....	91
Bovee v. Helland.....	51
Bresnahan, McKinney v.....	614
Brogan, Northern Pacific Ry. Co. v.....	461
Bunston, In re .....	83
Butte & Superior C. Co., Ltd., Harrington v.....	263
Canyon Creek Irrigation District v. Martin.....	339
Cartier, Degenhart v.....	102
Chicago, Milwaukee & St. P. Ry. Co., Freeman v.....	1
Chicago, Milwaukee & St. P. Ry. Co., Johnson v.....	73
Chicago, Milwaukee & Puget S. Ry. Co., Pierce v.....	110
Chicago, Milwaukee & St. P. Ry. Co., Pohl v.....	572
Chicago, Milwaukee & St. P. Ry. Co., R. M. Cobban Realty Co. v.....	256
Chicago, Milwaukee & St. P. Ry. Co., Thistlewood v. ....	619
Chicago, Milwaukee & Puget S. Ry. Co., Wallace v.....	345
Chilcott v. Rea .....	134
City of Butte v. Industrial Accident Board.....	75
City of Butte, Larkin v.....	410
City of Butte, Peterson v.....	13
City of Butte, Sharkey v.....	16

City of Helena, Custer Con. Mines Co. v.....	35
City of Helena, Public Service Commission v.....	527
City of Lewistown v. Warr.....	353
City of Lewistown v. Warr .....	358
City of Lewistown v. Warren.....	356
Clements, State (ex rel. Brandegee) v. ....	57
Cobban Realty Co. v. Chicago, Milwaukee & St. P. Ry. Co. . .	256
Coburn Cattle Co. v. Hensen.....	252
Cohn Co. v. Power City Drug Co.....	618
Combs, Taylor v.....	427
Continental Telegraph Co., Lahood v.....	313
Conway v. Monidah Trust.....	244
Crites v. Security State Bank .....	121
Cruse, Fowlie v.....	222
Custer Con. Mines Co. v. City of Helena.....	35
Davidson v. Davidson.....	441
Davis, Williams v.....	192
Davis, Williams v.....	366
Degenhart v. Cartier.....	102
De Sandro v. Missoula Light & Water Co.....	333
District Court, State (ex rel. Demitroff) v.....	613
District Court, State (ex rel. Johnson) v. ....	620
District Court, State (ex rel. McGrade) v.....	371
District Court, State (ex rel. Metcalf) v.....	46
District Court, State (ex rel. Norris) v.....	619
District Court, State (ex rel. Sell) v.....	457
District Court, State (ex rel. Sell) v.....	460
District Court, State (ex rel. Stuewe) v.....	618
District Court, State (ex rel. Wolfe) v.....	556
Donohue, Herlihy v.....	601
Donovan v. Jenkins.....	124
Duncan, State (ex rel. Taylor) v.....	69
Dunne v. Yund.....	24
Elijah v. Wright.....	438
Ellis, State (ex rel. Hauswald) v.....	505

Estate of McGinley, In re.....	620
Eustance v. Francis.....	295
First Nat. Bank of Miles City v. Barrett.....	359
Fowlie v. Cruse.....	222
Francis, Eustance v.....	295
Freeman v. Chicago, Milwaukee & St. P. Ry. Co.....	1
Glenn v. Birch & Sons Construction Co.....	414
Gomez, In re .....	189
Gregson Hot Springs Co., Henroid v.....	447
Harrington v. Butte & Superior C. Co., Ltd.....	263
Hauf v. School District No. 1.....	395
Healy, Berkin v.....	398
Hein, The Banking Co. of Montana v.....	238
Helena Light & Ry. Co., Batch v.....	517
Helland, Bovee v.....	151
Henroid v. Gregson Hot Springs Co.....	447
Hensen, Coburn Cattle Co. v.....	252
Herlihy v. Donohue.....	601
Hill, In re.....	561
Hill v. Rae.....	378
Hills v. Johnson.....	65
Honstain v. Board of County Commissioners.....	391
Huffine v. Lincoln.....	585
Industrial Accident Board, City of Butte v.....	75
Industrial Accident Board, Lewis & Clark County v.....	6
In re Bunston .....	83
In re Gomez .....	189
In re Hill .....	561
In re McGinley's Estate.....	620
In re Palm .....	558
In re Satterthwaite .....	550
In re Williams' Estate .....	192
In re Williams' Estate .....	366

Inter-State Power Co. v. Anaconda Copper Min. Co.....	509
Isbell v. Slette.....	156
Jenkins, Donovan v.....	124
Jenkins, Pritchett v.....	81
Johnson, Hills v.....	65
Johnson, Ryan v.....	100
Johnson v. Chicago, Milwaukee & St. P. Ry. Co.....	73
Keeler, State v.....	205
Kennedy v. Rogan.....	242
Kitts v. Woods.....	569
Klenze, McDonald v.....	142
Konning, Sheehan v.....	614
Lahood v. Continental Telegraph Co.....	313
Larkin v. City of Butte.....	410
Leslie, State (ex rel. Berthelote) v.....	615
Lewis, State v.....	495
Lewis & Clark County v. Industrial Accident Board.....	6
Lewis v. Steele.....	300
Lincoln, Huffine v.....	585
Long, Stokes v.....	470
Martin, Canyon Creek Irrigation District v.....	339
Maynard, Stone v.....	147
Mayor of Butte, State (ex rel. Nelson) v.....	615
Mayor of Butte, State (ex rel. Olson) v.....	616
McBain v. Northern Pacific Ry. Co.....	578
McCormick, Smith v.....	324
McDonald v. Klenze.....	142
McElwain, Blair v.....	617
McKinney v. Bresnahan.....	614
Martinucci, Vanina v.....	616
Miller, State (ex rel. Danaher) v.....	562
Miller v. Times-Journal Publishing Co.....	613
Missoula Light & Water Co., De Sandro v.....	333

Monidah Trust, Conway v.....	244
Moore v. Sherman.....	542
Nelson, Pascoe v.....	405
Northern Pacific Ry. Co. v. Brogan.....	461
Northern Pacific Ry. Co., McBain v.....	578
Northwestern Improvement Co. v. Rhoades.....	428
Palm, In re.....	558
Pascoe v. Nelson.....	405
Peterson v. City of Butte.....	13
Pierce v. Chicago, Milwaukee & Puget S. Ry. Co.....	110
Pilot-Butte Min. Co., Anaconda Copper Min. Co. v.....	165
Poe v. Sheridan County.....	279
Pohl v. Chicago, Milwaukee & St. P. Ry. Co.....	572
Power City Drug Co., Cohn Co. v.....	618
Pritchett v. Jenkins.....	81
Public Service Commission, City of Helena v.....	527
Rae, Hill v.....	378
Ravalli County, Anaconda Copper Min. Co. v.....	422
Rea, Chilcott v. ....	134
Rhoades, Northwestern Improvement Co. v.....	428
R. M. Cobban Realty Co. v. Chicago, Milwaukee & St. P. Ry. Co. ....	256
Rocky Mountain Elevator Co., State v.....	487
Rogan, Kennedy v.....	242
Russell, Ryan Co. v.....	596
Russell, State v.....	583
Ryan Co. v. Russell.....	596
Ryan v. Johnson.....	100
Satterthwaite, In re.....	550
School District No. 1, Hauf v.....	395
Security State Bank, Crites v.....	121
Sharkey v. City of Butte.....	16
Sheehan v. Konning.....	614

Sheridan County, Poe v.....	279
Sherman, Moore v.....	542
Slette, Isbell v.....	156
Slifer v. Yorath.....	129
Smith v. McCormick.....	324
State Bank of Yates, Ward v.....	328
State (ex rel. Berthelote) v. Leslie.....	615
State (ex rel. Brandegge) v. Clements.....	57
State (ex rel. Danaher) v. Miller.....	562
State (ex rel. Demitroff) v. District Court.....	613
State (ex rel. Hauswald) v. Ellis.....	505
State (ex rel. Johnson) v. District Court.....	620
State (ex rel. Lindsey) v. Ayers.....	62
State (ex rel. McGrade) v. District Court.....	371
State (ex rel. Metcalf) v. District Court.....	46
State (ex rel. Nelson) v. Mayor of Butte.....	615
State (ex rel. Norris) v. District Court.....	619
State (ex rel. Olson) v. Mayor of Butte.....	616
State (ex rel. Scollard) v. Board of Examiners.....	91
State (ex rel. Sell) v. District Court.....	457
State (ex rel. Sell) v. District Court.....	460
State (ex rel. Stuewe) v. District Court.....	618
State (ex rel. Taylor) v. Duncan.....	69
State (ex rel. Thorpe) v. Tattan.....	621
State (ex rel. Wolfe) v. District Court.....	556
State v. Keeler.....	205
State v. Lewis.....	495
State v. Rocky Mountain Elevator Co.....	487
State v. Russell.....	583
State v. Turnmire.....	331
State v. Williams.....	369
Steele, Lewis v.....	300
Stokes v. Long.....	470
Stone v. Maynard.....	147
Tattan, State (ex rel. Thorpe) v.....	621
Taylor v. Combs.....	427



The Banking Corporation of Montana v. Hein.....	238
Thistlewood v. Chicago, Milwaukee & St. P. Ry. Co.....	619
Times-Journal Publishing Co., Miller v.....	613
Turnmire, State v.....	331
Vanina v. Martinucci.....	616
Wallace v. Chicago, Milwaukee & Puget S. Ry. Co.....	345
Ward v. State Bank of Yates.....	328
Warr, City of Lewistown v. ....	353
Warr, City of Lewistown v. ....	358
Warren, City of Lewistown v.....	356
Williams' Estate, In re.....	192
Williams' Estate, In re.....	366
Williams, State v.....	369
Williams v. Davis.....	192
Williams v. Davis.....	366
Wright, Elijah v.....	438
Woods, Kitts v.....	569
Yorath, Slifer v.....	129
York v. Zimmerman Co.....	617
Yund, Dunne v.....	24
Zimmerman Co., York v.....	617



## TABLE OF CASES CITED—VOL. 52.

(For Cases Cited from the Montana Reports, see Table at End of This Volume.)

Ajax G. M. Co. v. Hilkey, 31 Colo. 131.....	187, 188
Amador M. G. Min. Co. v. South etc. Co., 13 Sawy. 523.....	177
American Sugar Ref. Co. v. Louisiana, 179 U. S. 89.....	383, 384
Armstrong v. McAlpin, 18 Ohio St. 184.....	109
Argues v. Wasson, 51 Cal. 620.....	160
Atchison etc. R. Co. v. Matthews, 174 U. S. 96.....	386
Atherton v. Fowler, 96 U. S. 513.....	118
Attorney General v. McGaughey, 23 R. I. 341.....	95
Baer v. Higson, 26 Utah, 78.....	31
Barbier v. Connolly, 113 U. S. 27.....	383
Bassey v. Gallagher, 20 Wall. (U. S.) 670.....	447
Beardslee v. Columbia Twp., 188 Pa. 496.....	485
Beauford L. & I. Co. v. New River L. Co., 86 S. C. 358.....	255
Bell-Wayland Co. v. Miller etc. Co., 39 Okl. 4.....	108
Benedict v. People, 23 Colo. 126.....	216, 221
Bergner v. Bergner, 219 Pa. 113.....	434
Bernard v. Eaton, 2 Cush. (Mass.) 303.....	160
Billings v. Illinois, 188 U. S. 97.....	386
Birch v. Abercrombie, 74 Wash. 486.....	310, 312
Blate v. Third Ave. Ry. Co., 44 App. Div. (N. Y.) 163.....	5
Braden v. Stumph, 16 Lea (Tenn.), 581.....	289
Brison v. Brison, 75 Cal. 525.....	594
Broadstreet v. Hall, 168 Ind. 192.....	310
Brotherton v. Manhattan Beach Co., 48 Neb. 563.....	455
Brown v. Critchell, 110 Ind. 81.....	290
Brown v. Randolph Co. Court, 45 W. Va. 827.....	289
Brown v. Volkening, 64 N. Y. 76.....	43
Buckingham v. Buckingham, 36 Ohio St. 68.....	291
Bunker Hill-S. Co. v. Empire St. I. Co., 134 Fed. 268.....	181
Bunker Hill-S. Co. v. Empire St. I. Co., 109 Fed. 538.....	180
Burdett v. Commonwealth, 103 W. Va. 838.....	49
Butterfield v. Forrester, 11 East, 60.....	9, 252
Campbell v. Holt, 115 U. S. 620.....	404
Carstenbrook v. Wedderien, 7 Cal. App. 465.....	108
Carter v. State, 99 Miss. 435.....	216
Cassaday v. Old Colony St. Ry., 184 Mass. 156.....	3
Cerini v. DeLong, 7 Cal. App. 398.....	289
Champion Min. Co. v. Consolidated etc. Min. Co., 75 Cal. 78.....	179
Cheadle v. State, 110 Ind. 301.....	53
Chicago etc. Ry. Co. v. Cass County, 8 N. D. 18.....	467
City of Geneva v. Burnett, 65 Neb. 464.....	478
Clark v. Buckmobile Co., 107 App. Div. (N. Y.) 120.....	309
Clark v. Fitzgerald, 171 U. S. 92.....	184
Clark v. Kansas City, 176 U. S. 114.....	383, 384, 386
Commonwealth v. Dandridge, 2 Va. Cas. 408.....	49
Commonwealth v. Webster, 5 Cush. (Mass.) 295.....	502
Connolly v. Union Sewer P. Co., 184 U. S. 540.....	385
Consolidated Min. Co. v. Champion Min. Co., 63 Fed. 540.....	187

Consumers' El. L. Co. v. Pryor, 44 Fla. 354.....	478
Cooper v. People, 13 Colo. 337.....	53
County of Calaveras v. Brockway, 30 Cal. 325.....	289
Crossen v. Oliver, 37 Or. 514.....	43
Crow v. Shepherd, 177 Mo. 205.....	50
Daily v. Maxwell, 152 Mo. App. 415.....	310
Daley v. City of St. Paul, 7 Minn. 390.....	540
David v. Portland W. Committee, 14 Or. 98.....	540
Deadman v. Yantis, 230 Ill. 243.....	278
Deering v. Wheeler, 76 Iowa, 497.....	109
De Jamatt v. Marquez, 127 Cal. 558.....	155
Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55.....	187
Dexter v. Codman, 148 Mass. 421.....	204
Dickey v. Reed, 78 Ill. 281.....	289
Doran v. Thomsen, 76 N. J. L. 754.....	310
Dorr v. Steichen, 18 Minn. 26.....	156
Dowd v. Holbrook, 152 N. C. 547.....	434
Drumm etc. Co. v. First Nat. Bank, 65 Kan. 746.....	163
Dunphy v. Kleinschmidt, 11 Wall. (U. S.) 610.....	446
Dutton v. State, 123 Md. 373.....	216
Ede v. Hazen, 61 Cal. 360.....	31
Eggleston v. Wagner, 46 Mich. 610.....	420
Elting v. Hickman, 172 Mo. 237.....	577
Empire St. I. Co. v. Bunker Hill & S. Co., 114 Fed. 417.....	181
Empire St. I. Co. v. Bunker Hill & S. Co., 121 Fed. 973.....	181
Enid etc. Ry. Co. v. Kephart, 19 Okl. 1.....	121
Ex parte Green, 46 Tex. Cr. 576.....	53
Ex parte McLeod, 120 Fed. 130.....	50
Ex parte Tom Tong, 108 U. S. 556.....	60
Fairbault v. Misener, 20 Minn. 386.....	577
Farmers' L. & T. Co. v. Long Beach I. Co., 27 Hun, 89.....	160
Farwell v. Boston etc. R. R. Co., 4 Met. (Mass.) 49.....	9
Field v. Thornell, 106 Iowa, 7.....	53, 55
Fish v. Coster, 28 Hun, 64.....	156
Fisher v. Baker, 203 U. S. 174.....	60
Fisk's Appeal, 81 Conn. 433.....	593
Flora v. Bimini W. Co., 161 Cal. 495.....	455
Forsythe v. City of Hammond, 142 Ind. 505.....	23
Fox v. Mohawk etc. Society, 165 N. Y. 517.....	389
Frost v. Witter, 132 Cal. 421.....	404
Gearon v. Greene, 32 App. Div. (N. Y.) 258.....	435
Gearon v. Greene, 47 App. Div. (N. Y.) 636.....	435
Gearon v. Kearney, 22 Misc. Rep. (N. Y.) 285.....	435
Geiss v. Twin City T. Co., 120 Minn. 368.....	310
Georgia Pac. Ry. Co. v. Davis, 92 Ala. 300.....	478
Gerlach v. Detroit U. Ry., 171 Mich. 474.....	525
Gibson v. Supervisors, 80 Cal. 359.....	289
Gilpatrick v. Glidden, 81 Me. 137.....	594
Gleason v. Commissioners, 30 Kan. 53.....	61
Graham v. Hastings & D. R. R. Co., 1 L. D. 362.....	117
Greer v. Newlands, 70 Kan. 315.....	163
Grimmett v. State, 22 Tex. App. 36.....	216, 220
Gundling v. Chicago, 177 U. S. 183.....	383

Hagar v. Reclamation Dist., 111 U. S. 701.....	575
Haggerty v. Brower, 105 Iowa, 395.....	279
Hanselman v. Carstens, 60 Mich. 187.....	478
Hastings & D. R. R. Co. v. Whitney, 132 U. S. 357.....	117
Hays v. Hogan, 180 Mo. App. 237.....	310
Henderson v. Grammar, 66 Cal. 332.....	402
Hitchcock v. Burgett, 38 Mich. 501.....	481
Hodges v. Colecord, 193 U. S. 192.....	117
Hopt v. Utah, 100 U. S. 430.....	503
Howe v. Newmarch, 12 Allen (Mass.), 49.....	310
Illinois C. R. R. Co. v. Behrens, 233 U. S. 473.....	581 <i>et seq.</i>
In re Brown, 168 N. C. 417.....	52
In re Chadwick, 109 Mich. 588.....	50
In re Cliff, 3 L. D. 216.....	117
In re Cooke, 116 La. 723.....	53
In re Esterbrook, 83 Vt. 229.....	202
In re Hurlburt, 89 N. Y. 259.....	127
In re Laird, 18 L. D. 502.....	117
In re Moore, 63 N. C. 397.....	49 <i>et seq.</i>
In re Pfahler, 150 Cal. 71.....	540
In re Pryor, 18 Kan. 72.....	53, 55
In re Relief Bills, 21 Colo. 62.....	389
In re Shortridge, 99 Cal. 529.....	218
Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196.....	187
Jackson v. Commonwealth, 100 Ky. 239.....	216
Jamestown etc. R. R. Co. v. Jones, 177 U. S. 125.....	120
Jennings v. Schwab, 64 Mo. App. 13.....	310
Jones v. Commissioners, 107 N. C. 248.....	289
Kayser v. Van Nest, 125 Minn. 277.....	310
Keller v. Lewis, 65 Ark. 578.....	481
Keyser v. Maas, 111 Ala. 390.....	162
Kitzman v. Minnesota Thresher M. Co., 10 N. D. 26.....	31
Kloke v. Gardels, 52 Neb. 117.....	31
Krieschel v. Board, 12 Wash. 428.....	289
Kugadt v. State, 38 Tex. Cr. 681.....	216
Laning v. New York C. R. R. Co., 49 N. Y. 521.....	9
Larkin v. Salt Air B. Co., 30 Utah, 86.....	455
Larmon v. Knight, 140 Ill. 232.....	593
Lashbrook v. Patten, 1 Duv. (Ky.) 316.....	310
Lauricella v. Lauricella, 161 Cal. 61.....	594
Lawson v. United States Min. Co., 207 U. S. 1.....	184
Lazarus v. Phelps, 152 U. S. 81.....	138
Legate v. Legate, 87 Tex. 248.....	61
LeGuen v. Gouverneur, 1 Johns. Ch. (N. Y.) 436.....	34
Leonard v. Brooklyn H. Ry. Co., 57 App. Div. (N. Y.) 125.....	525
Levy v. Burkle, 2 Cal. Unrep. 778.....	240
License Tax Cases, 5 Wall. (U. S.) 462.....	575
Lide v. State, 133 Ala. 43.....	216, 220
Light v. United States, 220 U. S. 523.....	138
Lindsay v. Allen, 112 Tenn. 637.....	289
Littleton v. Burgess, 16 Wyo. 58.....	291
Little Josephine M. Co. v. Fullerton, 58 Fed. 521.....	179
Long v. Loughran, 41 Iowa, 543.....	155
McDermott v. Severe, 202 U. S. 600.....	204
McFarlane v. Winters (Utah), 155 Pac. 437.....	309

McLeod v. St. Aubyn, 68 L. J. R. 137.....	51
McMaster v. Emerson, 109 Iowa, 284.....	164
McMichael v. Murphy, 20 L. D. 147.....	117
McMichael v. Murphy, 197 U. S. 304.....	117
McNamara v. Metropolitan St. Ry. Co., 133 Mo. App. 645.....	5
McNeal v. McKain, 33 Okl. 449.....	310
Maddox v. Brown, 71 Me. 432.....	310
Magoun v. Illinois T. & S. Bank, 170 U. S. 283.....	383, 386
Maher v. Benedict, 133 App. Div. (N. Y.) 579.....	309
Manatt v. Scott, 106 Iowa, 203.....	202
Marsden v. Harlocker, 48 Or. 90.....	289
Martin v. Pittsburg Ry. Co., 238 Pa. 528.....	5
Mason v. Richmond & D. R. Co., 111 N. C. 482.....	352
Mayer v. Taylor, 69 Ala. 403.....	162
Maxey v. Mack, 30 Ark. 472.....	289
Mechanics' B. & L. Assn. v. King, 83 Cal. 440.....	404
Meier v. Buchter, 197 Mo. 68.....	202
Miles v. United States, 103 U. S. 304.....	503
Mill v. Brown, 31 Utah, 473.....	555
Minidoka & S. W. R. R. Co. v. United States, 235 U. S. 211.....	120
Minneapolis etc. Ry. Co. v. Columbus R. Mill, 119 U. S. 149.....	420
Minneapolis etc. Ry. Co. v. Oppegard, 18 N. D. 1.....	467
Minton v. New York El. Ry. Co., 130 N. Y. 332.....	278
Mobile County v. Kimball, 102 U. S. 691.....	386
Montana Min. Co. v. St. Louis M. & M. Co., 102 Fed. 430.....	187
Moore v. Calvert, 8 Okl. 358.....	108
Morey v. Thybo, 199 Fed. 760.....	482
Morgan v. Adams, 29 App. Cas. (D. C.) 198.....	204
Morgan v. Kiser & Co., 105 Ga. 104.....	155
Mowry v. Norman, 223 Mo. 463.....	202
Mulvehill v. Bates, 31 Minn. 364.....	310
Mutual L. Ins. Co. v. Pacific Fruit Co., 142 Cal. 477.....	401
Munn v. Illinois, 94 U. S. 113.....	535
Murray v. South Carolina R. R. Co., 1 McMull. (S. C.) 385.....	9
Myers v. Holborn, 58 N. J. L. 193.....	481
Myers v. State, 97 Ga. 76.....	216
Noble State Bank v. Haskell, 219 U. S. 104.....	383 et seq.
Northern Pac. Ry. Co. v. Minnesota, 208 U. S. 583.....	535,
Orient Insurance Co. v. Daggs, 172 U. S. 557.....	386
Page v. Waring, 76 N. Y. 463.....	43
Palmer v. President etc., 120 N. Y. 170.....	525
Papst v. Hamilton, 133 Cal. 631.....	398
Parks v. Granger, 96 Miss. 503.....	155
Patterson v. Colorado, 205 U. S. 454.....	55
Patterson v. People, 23 Colo. App. 479.....	289
People (ex rel. Dean) v. Board, 6 Colo. 202.....	289
People (ex rel. Durand) v. Jeroloman, 139 N. Y. 14.....	568
People v. Bonney, 19 Cal. 426.....	503
People v. Bradley, 60 Ill. 390.....	61
People v. Dewey, 23 Misc. Rep. (N. Y.) 267.....	60
People v. Fitchburg R. Co., 18 N. Y. Supp. 269.....	156
People v. Gilbert, 199 N. Y. 10.....	210
People v. Hall, 51 App. Div. (N. Y.) 57.....	212, 221
People v. Hartmann, 103 Cal. 242.....	219
People v. Hoge, 55 Cal. 612.....	540

People v. Oakland W. F. Co., 118 Cal. 234.....	291
People v. O'Leary, 77 Cal. 34.....	560
People v. Kerrigan, 73 Cal. 222.....	222
People v. Koller, 142 Cal. 621.....	210
People v. Murray, 89 Mich. 276.....	218
People v. Swafford, 65 Cal. 223.....	216, 222
People v. Wiant, 48 Ill. 263.....	289
People v. Yaeger, 113 Mich. 228.....	218
Petit v. Minnesota, 177 U. S. 164.....	383
Pierce v. Langdon, 2 Idaho, 878.....	161
Ploetz v. Holt, 124 Minn. 169.....	310
Pollock v. Farmers' L. & T. Co., 157 U. S. 429.....	575
Potts v. Whitehead, 23 N. J. Eq. 512.....	420
Pollard v. McKenney, 69 Neb. 742.....	593
Powers v. Andrews, 84 Ala. 289.....	241
Pratt v. Huggins, 29 Barb. (N. Y.) 277.....	401
Premier Motor Mfg. Co. v. Tilford (Ind. App.), 111 N. E. 645.....	309
Priestly v. Fowler, 3 Mees. & W. 1.....	9
Providence v. Billings, 4 Pet. (U. S.) 514.....	537
Railroad Commission Cases, 116 U. S. 307.....	538
Reagan v. United States, 202 Fed. 488.....	213, 221
Reeves & Co. v. Sheets, 16 Okl. 342.....	164
Reynolds v. Buck, 127 Iowa, 601.....	309
Rex v. Gray, 2 Q. B. 36.....	51
Richmond v. Richmond, 20 Fed. Cas. No. 11,801.....	279
Roach v. Garvan, 2 Atk. 469.....	49
Robertson v. State, 64 Fla. 437.....	215, 222
Roxanna G. Min. Co. v. Cone, 100 Fed. 168.....	180
Salt Lake City v. Wilson (Utah), 148 Pac. 1104.....	577
San Francisco etc. Ry. Co. v. Stockton, 149 Cal. 83.....	467
San Jose S. Dep. Bank v. Bank, 144 Cal. 574.....	402
Santa Clara Co. v. Southern Pac. Ry. Co., 118 U. S. 394.....	468
Schaefer v. Osterbring, 67 Wis. 495.....	310
Schneringer v. Schneringer, 81 Neb. 661.....	593
Seibold v. People, 86 Ill. 33.....	537
Shane v. City of Hutchinson, 88 Kan. 188.....	577
Shaw v. Circuit Court, 27 S. D. 49.....	289
Shields v. Buddy, 2 Idaho, 884.....	161
Shockley v. Shepherd, 9 Houst. (Del.) 270.....	310
Short v. State, 80 Md. 392.....	577
Simmons v. Anderson, 44 Minn. 487.....	164
Simmons v. Georgia Iron etc. Co., 117 Ga. 305.....	61
Simpson County v. Buckley, 85 Miss. 713.....	289
Smith v. Jordan, 211 Mass. 269.....	310
Smith v. Metropolitan St. Ry. Co., 59 App. Div. (N. Y.) 60.....	525
Spring Valley v. Spring Valley C. Co., 71 Ill. App. 432.....	537
Spring Valley W. Works v. Schottler, 110 U. S. 347.....	535
Stahl v. Stahl, 214 Ill. 131.....	594
Stalker v. Oregon S. L. Ry. Co., 225 U. S. 142.....	119, 120
State (ex rel. Ashbaugh) v. Circuit Court, 97 Wis. 1.....	53
State v. Baldwin, 14 S. C. 135.....	376
State v. Bee Pub. Co., 60 Neb. 282.....	53
State v. Brooks, 92 Mo. 542.....	216
State v. Callahan, 100 Minn. 63.....	216, 220
State v. Copp, 15 N. H. 212.....	218
State v. Crook, 16 Utah, 212.....	560
State v. Davis, 48 Kan. 1.....	503

State v. Hensley, 75 Ohio St. 255.....	218
State v. Hildreth, 82 Vt. 382.....	49
State v. Huegin, 110 Wis. 189.....	60
State v. Johnson, 26 Idaho, 609.....	214, 221
State v. Kaiser, 20 Or. 50.....	53
State v. Killion, 95 Kan. 371.....	503
State v. McCool, 34 Kan. 617.....	215, 221
State v. Morrill, 16 Ark. 384.....	49, 50
State v. Nelson County, 1 N. D. 88.....	12
State v. Nyhus, 19 N. D. 326.....	215, 222
State v. Osborne, 54 Or. 289.....	218
State v. Potter, 15 Kan. 302.....	503
State v. Rayburn, 2 Okl. Cr. 413.....	577
State v. Tugwell, 19 Wash. 238.....	53
State Board v. Hart, 104 Minn. 88.....	53
Storey v. People, 79 Ill. 45.....	53
Stowe v. Morris, 147 Ky. 386.....	310
Stuart v. People, 3 Scam. (4 Ill.) 385.....	56
Sweatt v. Faville, 23 Iowa, 321.....	289
Taunton v. Goforth, 6 Dowl. & R. 384.....	402
Taylor v. Felsing, 164 Ill. 331.....	478
Tekoa v. Reilly, 47 Wash. 202.....	577
Territory of New Mexico v. United States T. Co., 172 U. S. 171.....	466
Texas etc. Ry. Co. v. Allen, 114 Fed. 177.....	525
Texas etc. Ry. Co. v. Hamilton, 66 Tex. 92.....	525
Thompson's Lessee v. White, 1 Am. Dec. 252.....	594
Tilton v. State, 3 Ga. App. 59.....	219
Treadwell v. Whittier, 80 Cal. 574.....	525
Turlington v. Tampa E. Co., 62 Fla. 398.....	455
Tyler Min. Co. v. Last Chance Min. Co., 71 Fed. 848.....	177, 183
Tyler Min. Co. v. Sweeney, 79 Fed. 277.....	177
Ulrich v. Clement, 124 N. Y. Supp. 133.....	289
United States v. Van Auken, 96 U. S. 366.....	127
Vandall v. Teague, 142 Cal. 471.....	402
Volkmar v. Manhattan Ry. Co., 134 N. Y. 418.....	525
Wagner v. City of Rock Island, 146 Ill. 139.....	540
Wall v. United States Min. Co., 232 Fed. 613.....	181
Waltermire v. Westover, 14 N. Y. 16.....	401
Walrath v. Champion Min. Co., 63 Fed. 552.....	187
Walrath v. Champion Min. Co., 171 U. S. 293.....	187
Warden B. & G. Co., v. Raymond, 7 S. D. 451.....	155
Watson v. Edwards, 105 Cal. 70.....	279
Watson v. Williams, 36 Miss. 831.....	56
Weber v. Rothschild, 15 Or. 385.....	595
Weir v. Union Pac. Ry. Co., 112 App. Div. (N. Y.) 109.....	525
Wells v. Harter, 56 Cal. 342.....	403
Wheeler v. Becker, 68 Iowa, 723.....	161
Wieland v. Shillock, 23 Minn. 227.....	31
Williams v. Fears, 179 U. S. 270.....	383
Williamson v. Lacey, 86 Me. 80.....	219
Wilson's Estate, 117 Cal. 262.....	202
Wimmer v. Ficklin, 14 Bush (Ky.), 193.....	278
Winnovich v. Emery, 33 Utah, 345.....	60
Witherspoon v. Duncan, 4 Wall. (U. S.) 210.....	117
Wood v. City of Detroit (Mich.), 155 N. W. 592.....	80
Work M. & M. Co. v. Doctor Jack P. M. Co., 194 Fed. 620.....	188



## **SUPREME COURT RULES.**

**For Rules of the Supreme Court of the State of Montana, see  
44 Mont. xxv.**

**(xxix)**



## ERRATA.

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On page 257, in first line, read "estoppel" for "estopped."

On page 263, line 4 of paragraph 3 of syllabus, read "free" for "fee."

On page 422, line 2, paragraph 1 of syllabus, insert "as" after word "well."

(xxxi)



CASES DETERMINED  
IN THE  
SUPREME COURT

AT THE  
DECEMBER TERM, 1915.

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THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,  
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

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FREEMAN, RESPONDENT, v. CHICAGO, M. & ST. P. RY. CO.  
ET AL., APPELLANTS.

(No. 3,586.)

(Submitted January 7, 1916. Decided January 24, 1916.)

[154 Pac. 912.]

*Personal Injuries—Railroads—Carrier and Passenger—Derailment—Presumptions—Negligence—Prima Facie Case—Showing Necessary—Mitigation of Damages—Limit of Rule.*

Carrier and Passenger—Derailment—Presumptions—Jury Question.

1. The derailment of a railway car in which plaintiff was riding as a passenger, raised a presumption of negligence; a showing to the contrary by defendant presented a question for the jury.

Same—Presumptions—Plaintiff may Rely on, When.

2. Where the record did not establish the cause of a derailment, plaintiff was not deprived of the presumption incident to the derailment.

Same—Evidence—Causal Connection—Sufficiency.

3. Evidence held to show a causal connection between the derailment of a railway car and plaintiff's injuries consisting of "wrist-drop" and minor hurts, caused by being thrown against the side of the car, and to establish liability for the resultant damages.

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On the question of presumption of negligence for injury to passenger by derailment, see notes in 13 L. R. A. (n. s.) 608; 29 L. R. A. (n. s.) 811.

Same—Negligence—*Prima Facie* Case—Showing Necessary.

4. In a personal injury action, it is sufficient to make out a *prima facie* case if plaintiff can show that the injury is more naturally to be attributed to the negligence alleged than to any other cause, the rule of absolute exclusion of any other cause not being applicable in civil actions.

Same—Mitigation of Damages—Limit of Rule.

5. While an injured person must use ordinary diligence to effect a cure and thus to minimize the damages, he is not required, after one unsuccessful operation, to undergo another and major operation, risking failure in that as well, in order to bring about that result.

[As to derailment of train as raising presumption of negligence on part of company, see note in *Ann. Cas.* 1913E, 552.]

*Appeal from District Court, Meagher County; J. A. Matthews, Judge.*

ACTION by Joseph H. Freeman against the Chicago, Milwaukee & St. Paul Railway Company and another. Judgment for plaintiff, and defendants appeal from it and an order denying their motion for a new trial. Affirmed.

*Messrs. Shelton & Furman, Mr. A. J. Verheyen and Mr. J. D. Glenn*, for Appellants, submitted a brief; *Mr. Fred. J. Furman* argued the cause orally.

*Messrs. Purcell & Horsky and Messrs. Jones & Jones*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent, plaintiff below, brought this action to recover for personal injuries alleged to have been suffered by him while a passenger on one of the trains of the appellant railway company in consequence of the derailment thereof. The questions presented are whether negligence on the part of appellants was shown; whether such negligence was the proximate cause of the injuries complained of; whether the damages awarded are excessive; whether the verdict is contrary to law; and whether errors of law prejudicial to the appellants were committed at the trial.

1. It is not disputed that the respondent was a passenger [1] for hire, and that the car in which he rode was derailed.

This raises a presumption of negligence. (*Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988; *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867.) If the evidence presented by appellants tended to show the contrary, its utmost effect was to raise a question for the jury. (Rev. Codes, sec. 8028, subd. 2; 3 Thompson on Negligence, sec. 2773.) Some contention is made that the presumption of negligence arising from the derailment is not available to respondent, because he presented evidence tending to show the cause of the derailment.

[2] The record does not show that the cause of the derailment was established. Hence the respondent was not, either as a matter of pleading (*Hoskins v. Northern Pac. Ry. Co.*, *supra*) or as a matter of proof (*Cassady v. Old Colony St. Ry.*, 184 Mass. 156, 63 L. R. A. 285, 68 N. E. 10), deprived of the benefit of the presumption.

2. The derailment occurred on June 30, 1913, at Harlowton.

[3] The injuries imputed to it by the complaint are that the respondent was bruised, shocked and wounded; that his right arm and right ankle were bruised and broken; that other injuries theretofore sustained by him and from which he was then recovering were greatly aggravated; that his injuries are permanent; and that, because of them, he has sustained great bodily and mental suffering, and is incapacitated for business. The evidence produced in his behalf tends to show these facts: He is a rancher, and at the time in question was fifty-two years old. On the preceding 16th of May he met with an accident which resulted in the breaking of his right arm above the elbow, and a "Pott's fracture" of the right ankle. For these he sought and received such medical treatment that at the time of the derailment he was in a fair way to complete recovery; his arm and ankle giving him no trouble. In the derailment he was thrown bodily against the side of the car, striking against his right elbow, and thereafter his elbow was found to be sore and discolored, his arm hurt, his ankle sprained, his head bruised; he suffered loss of sleep and much pain from both ankle and arm, and two or three weeks later began to lose

control of his wrist and hand. This loss of control has since become total, showing an affection of the nerve which supplies the muscles of the forearm, wrist and hand, creating a form of paralysis known to the surgeons as "wrist-drop." The course of this nerve leads close to the elbow, and the condition of wrist-drop could have resulted, and it is reasonably probable that it did result, from the impact of the arm against the side of the car as stated above. A surgical examination of the respondent in October, 1913, disclosed that the nerve in question had become imbedded in a callous surrounding the point of the old fracture. No such condition was indicated in the middle of June, and was not probable as matters then stood. It could have been caused by excessive motion or too early use of the arm, but there is nothing to show that such was, or probably was, the cause. At the October examination the surgeon dissected the nerve from the callous, the purpose being to allow the nerve to regenerate if it would, but the wrist-drop remains and will remain unless something further is done. We think this shows a causal connection between the derailment and the wrist-drop, as well as the minor injuries complained of, and [4] to establish liability for the damages appropriate thereto. True, the evidence does not absolutely exclude the possibility of any other cause of the wrist-drop; but courts cannot attain to scientific demonstration, and the rule of absolute exclusion prevailing in criminal cases does not apply to civil actions. "It is sufficient to make out a *prima facie* case if the plaintiff can show that the injury is more naturally to be attributed to the negligence alleged than to any other cause." (*Andree v. Anaconda C. Min. Co.*, 47 Mont. 554, 133 Pac. 1090.)

3. We quite agree with counsel for appellants that, if we ignore the wrist-drop, the damages awarded would be grossly excessive. But the wrist-drop cannot be ignored, for it means the loss of the right hand; unless the respondent can be relieved, he is worse off than if he had suffered amputation. [5] It is argued that this may not be considered, because Dr.



Keistler believes that an operation will relieve him. So Dr. Keistler believed in October, when an operation was performed for that purpose without result; and he also says: "An operation at this time might produce complete recovery, and it might not." In any case the operation is not a simple one, but a "major operation, one that involves delicate structures and the import of which is more serious." We recognize the rule that an injured person must use ordinary diligence to effect a cure and thus to minimize the damages (*Tiggerman v. City of Butte*, 44 Mont. 138, 119 Pac. 477; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673); but it would be carrying this rule to an absurd extreme to hold that a man who has submitted to one operation, which failed, must take such chances with his life and his health as may be involved in a second, risking failure in that as well, in order that the damages caused by another's negligence may possibly be reduced. (Watson on Damages, sec. 186; *Martin v. Pittsburgh Ry. Co.*, 238 Pa. 528, 48 L. R. A. (n. s.) 115, 86 Atl. 299; *Blate v. Third Ave. Ry. Co.*, 44 App. Div. 163, 60 N. Y. Supp. 732; *McNamara v. Metropolitan St. Ry. Co.*, 133 Mo. App. 645, 114 S. W. 50.) So, considering the wrist-drop as well as the minor injuries sustained by the respondent, taking some cognizance of the pain and anguish necessarily entailed thereby, and noting the respondent's expectancy of life and his loss of earning capacity, in connection with the cost of an annuity to recoup the same, we cannot pronounce the award so excessive as to shock the conscience; we do not even think it should be scaled. (*Lewis v. Northern Pac. Ry. Co.*, 36 Mont. 207, 92 Pac. 469; *White v. Chicago etc. Ry. Co.*, 49 Mont. 419, 143 Pac. 561; *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.)

4. It is suggested that the verdict is contrary to the court's instructions numbered 6, 7, 12 and 13, and therefore is against law. We find no argument specifically directed to this proposition, but careful consideration of it fails to disclose wherein such contrariety exists.

6 LEWIS & CLARK COUNTY v. INDUSTRIAL ACC. Bd. [Dec. T. '15]

5. The other assignments of error are procedural, and none of them, in our opinion, command a reversal of this case.

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
CONCUR.

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LEWIS AND CLARK COUNTY, RESPONDENT, v. INDUS-  
TRIAL ACCIDENT BOARD, APPELLANT.

(No. 3,783.)

(Submitted January 3, 1916. Decided January 27, 1916.)

[155 Pac. 268.]

*Counties—Workmen's Compensation Act—Applicability—Con-  
stitution.*

Counties—Workmen's Compensation Act—Constitution—Sufficiency of Title.

1. *Held*, that the Workmen's Compensation Act (Chap. 96, Laws 1915) applies to counties and county employees, the contention that its title is insufficient to warrant their inclusion in the body of the measure, under section 23, Article V, of the Constitution, being untenable.

Same—Constitution—Class Legislation—Donations.

2. *Held*, further, that the Act above, as applied to county employees, is neither obnoxious as class legislation, nor in violation of the constitutional prohibition against donations to individuals.

Same—Taxation—"Public Purpose"—Constitution.

3. The question whether a particular purpose for which taxes may be levied and collected is a public one, under section 11, Article XII, Constitution, is for the legislature in the first instance, and courts will indulge every reasonable presumption in favor of the legislative decision in this respect.

Same.

4. Taxes levied to provide a fund to be devoted to the relief of injured employees of a county which is subject to the provisions of the Workmen's Compensation Act, *held* to be for a public purpose, and therefore not obnoxious as offending against the provision of section 11, Article XII, of the Constitution.

[As to which is "injury" or "personal injury" within meaning of Workmen's Compensation Act, see note in *Ann. Cas.* 1915C, 921.]

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On the question of constitutionality of statute rendering master liable for injury to servant irrespective of negligence, see note in 34 L. E. A. (n. s.) 162.

And as to the constitutionality of the workmen's compensation statute, see note in L. E. A. 1916A, 23.

*Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.*

PROCEEDINGS under the Workmen's Compensation Law by Lewis and Clark County against the Industrial Accident Board. From the judgment rendered, the board appeals. Affirmed.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Appellant, submitted a brief; *Mr. Wagner* argued the cause orally.

*Mr. A. H. McConnell* and *Mr. Joseph P. Donnelly*, for Respondent, submitted a brief; *Mr. Donnelly* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This appeal presents the question: Do the provisions of the Workmen's Compensation Law (Chapter 96, Laws 1915) apply to counties and county employees? The trial court answered the inquiry in the affirmative, and the Industrial Accident Board appealed.

By specific legislative declarations contained in sections 3(e), 6(gg) and 6(i), counties and county employees are made subject to the terms of the Act, but it is the contention of [1] counsel for appellant that those provisions are to be disregarded as without force or validity, because the title to the Act is not sufficiently comprehensive to warrant their inclusion in the body of the measure.

Section 23, Article V, of the Constitution, provides: "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be embraced in any Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed." Beginning with *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821, 823, and continuing down to *State ex rel. Cotter v. District*

*Court*, 49 Mont. 146, 140 Pac. 732, this court has repeatedly considered and defined the purposes and limitations of this section of the Constitution, and they need not be restated here. The title to Chapter 96, above, is as follows: "An Act providing for the protection and safety of workmen in all places of employment and for the inspection and regulation of places of employment in all inherently hazardous works and occupations; providing a schedule of compensation for injury to or death of workmen and methods of paying the same, and prescribing the liability of employers who do not elect to pay such compensation; establishing the industrial accident board, defining its powers and duties; and providing for a review of its awards."

It may be conceded at once that counties and county employees are not included, *eo nomine*, in this title; and we agree with counsel that general legislation is intended primarily for the subjects and not for the sovereign, and that the rules of statutory construction require that we enter upon our investigation of the meaning and purpose of a legislative enactment, indulging the presumption that the lawmakers intended to legislate upon the rights and affairs of individuals, and that the state or the public will not be deemed to be within the purview of such enactment, unless expressly named or included by fair implication. In their brief, counsel for appellant say: "Theorize as we will, Compensation and Employer's Liability Acts are nothing more or less than substitutes for, and intended to supplant, the recognized unsatisfactory and oftentimes disappointing and uncertain common-law and statutory tort remedies which furnished the only legal haven of refuge for an injured employee." At the time Chapter 96 was enacted a county of this state was not liable for damages to its injured employee, and therefore, if counsel are correct in their analysis of the purpose of this Act, it would seem to be a justifiable conclusion to be reached by anyone entertaining the same view and considering the title of this Act only, that it was never intended to subject counties or county employees to its provisions. But that counsel has misconceived the object and purpose of the

Act is quite patent when the history of this character of legislation is considered.

Liability and compensation statutes are not to be grouped together. They are the antipodes of labor legislation, having their foundation in essentially different social and economic ideas.

The common law of England and America and the Civil Code of continental Europe furnished but a single remedy for a servant's injury—an action for damages in which it was made to appear that the negligence of the master was a proximate cause of the injury. The harshness of the rule was emphasized when there was ingrafted on it the defenses of contributory negligence (*Butterfield v. Forrester*, 11 East, 60), fellow-servant's negligence (*Priestly v. Fowler*, 3 Mees. & W. 1; *Murray v. South Carolina R. R. Co.*, 1 McMull. (S. C.) 385, 36 Am. Dec. 268), and assumption of risk (*Farwell v. Boston & Worcester R. R. Co.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339; *Laning v. New York C. R. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417). With the increased hazards consequent upon the use of high explosives, complicated and dangerous machinery, and the powerful agencies of steam and electricity, the percentage of injured employees having justiciable claims rapidly decreased, until relief was sought in liability statutes which modified or eliminated some or all of the common-law defenses. But whether the remedy was sought at common law or under an employers' liability statute, the actionable wrong of the master, or actionable wrong for which the master was liable under the maxim *respondeat superior*, was the gist of the claim for damages and the basis of any right to recover. Experience demonstrated that more than one-half of all industrial injuries resulted from inevitable accident or from the risks of the business for which no one could be held responsible; that neither the common law nor employers' liability statutes furnished any measure of relief to more than twelve or fifteen per cent of the injured, and that further appreciable improvement from the modification of existing laws could not be expected so long

as the element of negligence was the foundation of legal liability.

Workingmen's Insurance and Compensation Laws are the products of the development of the social and economic idea that the industry which has always borne the burden of depreciation and destruction of the necessary machinery, shall also bear the burden of repairing the efficiency of the human machines without which the industry itself could not exist. The economic loss from vocational disease, industrial accident, invalidity, old age and unemployment was a subject of serious inquiry among the constituent German states before the days of the empire, but the credit for crystallizing the sentiment into workable laws will always remain with Bismarck. From the enactment of the sick insurance statute in Germany in 1883, and the fundamental law in 1884, the idea of compensation based only upon the risks of the business and the impairment of earning efficiency spread to other European states, and finally penetrated to this country. The federal government, thirty-one states, Alaska, Hawaii and the canal zone now have measures for the relief of injured workmen patterned after the German insurance or English compensation plan. Each system seeks the same ultimate end, but by somewhat different means, and "workmen's compensation" is a term sufficiently comprehensive for all practical purposes to include both. The fundamental difference between the conception of liability and compensation is found in the presence in the one, and the absence from the other, of the element of actionable wrong. The common-law and liability statutes furnished an uncertain measure of relief to the limited number of workmen who could trace their injuries proximately to the master's negligence. Compensation laws proceed upon the theory that the injured workman is entitled to pecuniary relief from the distress caused by his injury, as a matter of right, unless his own willful act is the proximate cause, and that it is wholly immaterial whether the injury can be traced to the negligence of the master, the negligence of the injured employee or a fellow-servant, or

whether it results from an act of God, the public enemy, an unavoidable accident, or a mere hazard of the business which may or may not be subject to more exact classification; that his compensation shall be certain, limited by the impairment of his earning capacity, proportioned to his wages, and not dependent upon the skill or eloquence of counsel or the whim or caprice of a jury; that as between workmen of the same class who suffer like injuries, each shall receive the same compensation, and that, too, without the economic waste incident to protracted litigation and without reference to the fact that the injury to the one may have been occasioned by the negligence of the master, and to the other by reason of his own fault.

Confronted with a legislative history covering more than thirty years and extending to practically all of Europe, to many of the Europeans dependencies, and to more than one-half of the United States, the members of the legislative assembly of 1915 must be credited with an understanding of compensation measures as they were generally understood at that time, and with an intention to employ terms appropriate to such measures as they were generally employed under like circumstances. In drafting this measure and formulating a title for it, we must assume that the members of the legislative assembly appreciated the fact that they were departing from the rule of liability in favor of the few, to establish a rule of compensation for injured workmen generally—one which would insure relief without reference to the question of fault and altogether irrespective of whether, under existing laws, actions for damages would lie. They therefore employed the term "workmen" in the title to this Act, in its generic sense and intended thereby to include the employees of a county, as well as the servants of individuals or private corporations engaged in the extrahazardous occupations enumerated in the Act. Since the title selected "fairly indicates the general subject of the Act, is comprehensive enough in its scope reasonably to cover all the provisions thereof, and is not calculated to mislead either the legislature or the public," it must be held to be sufficient to meet the requirements of the

Constitution above. (*Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462.) For the history of industrial insurance and workmen's compensation legislation, reference may be had to 24th Annual Report of U. S. Commissioner of Labor 1909, and to Boyd's *Workmen's Compensation*.

We are unable to appreciate much of counsel's argument in [2] support of the contention that this statute is open to the objection that it is obnoxious class legislation. In the absence of any restriction in the Constitution, the legislature was free to establish a measure of duty owing to a public employee different from that owing to a citizen who is not in the public service, and it cannot be contended that a classification of workmen based upon the risks of their employment is either arbitrary or unreasonable. If the compensation to be paid to an employee injured in the service of the county is to be treated as charity under an assumed name, then it might be conceded that this measure conflicts with the provisions of section 1, Article XIII, of the Constitution; but that is not the conception of compensation statutes.

A county subject to the provisions of this Act will, of necessity, be compelled to levy taxes to meet the assessments made [3] upon it under section 40, and this cannot be done unless the purpose to which the money so raised is to be devoted is a public purpose. Section 11, Article XII, of the Constitution, provides: "Taxes shall be levied and collected by general laws [4] and for public purposes only." Whether a particular purpose is "public," as that term is employed above, is not always easy of solution. The power of taxation is a legislative prerogative, and therefore the determination of the question whether a particular purpose is or is not one which so intimately concerns the public as to render taxation permissible is for the legislature in the first instance. (37 Cyc. 720; *State v. Nelson County*, 1 N. D. 88, 26 Am. St. Rep. 609, 8 L. R. A. 283, 45 N. W. 33; 1 Cooley on Taxation, 182.) The general rule of constitutional law that courts will indulge every reasonable presumption in favor of legislation is applicable with peculiar force to the case



of a legislative decision upon the purpose for which a tax may be laid. (1 Cooley on Taxation, 185.) In sections 3(e) and 6(gg) of this Act the legislature has determined that the money to be contributed by a county to the fund for the relief of its injured employees is to be devoted to a public purpose—an ordinary and necessary county expense. In *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554, we held that a statute which in effect levied a tax upon the coal mining industry to provide an insurance fund for injured miners was a valid exercise of the taxing power, and that the purpose sought to be subserved was a public purpose, within the meaning of section 11 above. It is unnecessary to again review the authorities which support that conclusion. We are satisfied with its correctness, and that the determination of the question in that case is decisive of it in this.

The judgment of the district court is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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PETERSON, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 3,588.)

(Submitted January 8, 1916. Decided January 27, 1916.)

[155 Pac. 265.]

*Res Judicata—Judgment on Merits—Failure to Appeal—Effect.*

1. A judgment, in an action for damages caused to plaintiff's property by a change in a street grade, which recited that, as shown by the evidence, it was barred by subdivision 3 of section 6447, Revised Codes, being upon the merits, was conclusive on that point, and in the absence of a timely appeal, became final, and constituted a bar to another action on the same cause.

*Appeal from District Court, Silver Bow County; Michael Donlan, Judge.*

ACTION by John Peterson against the City of Butte. Judgment for plaintiff. Defendant appeals from it and an order denying it a new trial. Reversed and remanded, with directions to dismiss.

*Messrs. Alexander Mackel, Wm. F. Davis and N. A. Rotering*, for Appellant, submitted a brief; *Messrs. Davis and Rotering* argued the cause orally.

*Messrs. Nolan & Donovan*, for Respondent, submitted a brief.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff having recovered a judgment for damages alleged to have been caused by the defendant by a change of the grade of its streets adjacent to and in front of plaintiff's property, the defendant has appealed from the judgment and an order denying its motion for a new trial.

This controversy was heretofore before this court in another case under the same title, on appeal from a judgment rendered on the pleadings in favor of the defendant. The decision is reported in 44 Mont. 129, 120 Pac. 231. Reference is made to that case for a statement of facts showing the character of the controversy. The present action was commenced on January 19, 1912. Its general demurrer to the complaint having been overruled, the defendant interposed the defenses (1) that plaintiff's cause of action is barred by subdivision 3 of section 6447, and subdivision 2 of section 6449 of the Revised Codes; (2) that in an action heretofore brought by plaintiff against the defendant upon the same cause of action, said action being designated in the district court as cause A2026, a final judgment was rendered for the defendant on the merits; that this judgment has never been reversed, modified, or set aside; that it is now in full force and is *res judicata* as to the cause of action herein. In his reply, plaintiff by denials and counter averment joined issue upon these allegations, except so far as they relate to the identity of the cause of action and the parties. The cause was

tried to the court without a jury. It found that the judgment in cause A2026 had not been rendered on the merits, and determined that plaintiff's right to recover in this action was not concluded by it.

In their brief counsel discuss many questions relating to errors and irregularities in the proceedings during the trial. As we view the case, it is not necessary to determine any of [1] these. The vital question presented is whether the judgment in cause A2026 was upon the merits, and as such precludes recovery in this action. That it does is clear, as we shall briefly demonstrate.

The record discloses that the trial of cause A2026, after plaintiff and defendant had, respectively, concluded the introduction of evidence, the defendant moved the court to direct a verdict in its favor upon the ground, among others, that the evidence disclosed that the action was barred by the provisions of sections 6447 and 6449 of the Revised Codes. The motion was sustained, expressly on the ground that the action was barred by subdivision 3 of section 6447, and the jury were directed to return a verdict for the defendant. This was done, and thereupon the court rendered and caused to be entered judgment for the defendant for costs. All this appears from the recitals in the judgment itself. The conclusion cannot be avoided that the court was of the opinion, and intended to declare, and did declare, that plaintiff's cause of action was barred by the provision of the statute made the basis of the decision. In other words, the exact question determined appears upon the face of the judgment. Therefore, *proprio vigore*, it became conclusive upon the question decided. (Rev. Codes, secs. 7914, 7917.) It is not of avail that the determination was for any reason erroneous. If such was the case, the only escape for plaintiff from being concluded by it was to have it set aside on appeal, or by other appropriate method. (*Peterson v. City of Butte, supra; Dunseth v. Butte El. Ry. Co.*, 41 Mont. 14, 21 Ann. Cas. 1258, 108 Pac. 567.) This was not done. It was allowed to stand, and has long since become final.

Nothing said in the opinion in *Peterson v. City of Butte* can aid the plaintiff in this case. The judgment in that case had been rendered on the pleadings. It was determined by this court on the appeal that, in view of the issues presented by the pleadings, the judgment should have been one in abatement, and not one on the merits, for the reason that the merits could not have been determined in cause A2026, except upon a hearing of evidence. Now it appears that the judgment in A2026, instead of being a judgment in abatement, as appeared from the pleadings in *Peterson v. City of Butte*, was in fact a judgment on the merits.

The judgment and order of the district court are reversed and the cause is remanded, with directions to dismiss the action.

*Reversed and remanded.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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SHARKEY, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 3,786.)

(Submitted January 10, 1916. Decided February 1, 1916.)

[155 Pac. 266.]

*Cities and Towns—Annexation of Territory—Inclusion of Unplatted Ground—Illegal Procedure—Direct and Collateral Attack—Injunction—Defective Decree—Harmless Error.*

Cities and Towns—Powers—When to be Denied.

1. Whenever there is a fair and reasonable doubt of the existence of a power, in a municipal corporation, either expressly conferred or necessarily implied, to do a certain thing, the doubt must be resolved against its exercise.

Same—Annexation of Territory—Inclusion of Unplatted Ground.

2. Under section 3214, Revised Codes, a city may not extend its boundaries so as to include unplatted ground.

Same—Illegal Procedure—Effect.

3. Proceedings had by a city to annex territory, a portion of which was unplatted, contrary to statutory provision (Rev. Codes, sec. 3214), were void *in toto*.

**Same—Direct and Collateral Attack.**

4. Where the purpose of a taxpayer's action was to have proceedings looking to the annexation of territory to a city declared void *ab initio* and the city enjoined from assuming jurisdiction over the persons or property situated within unplatted territory illegally sought to be included, the attack was direct, and not collateral.

**Same—Remedy—Injunction.**

5. Injunction *held* to be a remedy available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city.

**Same—Resolution of Council—Untrue Statement—Effect.**

6. The recital in a city council's resolution that territory proposed to be annexed to the city was contiguous and platted, when such was not the fact, could not inure to the city's benefit, or preclude a resident of the territory attempted to be annexed, from any available remedy he would otherwise have.

**Same—Defective Decree—Harmless Error.**

7. Error in a decree perpetually enjoining a city from assuming jurisdiction over territory illegally attempted to be annexed, without limiting its effect to the particular proceeding then at bar, *held* harmless.

[As to the necessity that property to be annexed to city be adjacent thereto, see note in *Ann. Cas.* 1913D, 401.]

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

Suit by John Sharkey against the City of Butte. Judgment for plaintiff; motion for new trial denied, and the defendant appeals. Judgment and order affirmed.

*Messrs. J. V. Dwyer, John A. Groeneveld and N. A. Rotering*, for Appellant, submitted a brief; *Mr. Rotering* argued the cause orally.

The proceeding amounts to a collateral attack. A collateral attack upon the city council's proceedings, like the one now before the court, cannot be maintained. Injunction might, perhaps, have been the remedy had the proceedings not been consummated, but at the moment the proceedings were consummated, not injunction, but *quo warranto*, was the remedy.

"The validity of the act of a town board in changing the boundaries of a town cannot be attacked in a collateral proceeding under Chapter 54, Laws of Wisconsin, 1883." (*Schriber v. Town of Langlade*, 66 Wis. 616, 29 N. W. 547, 554; *Powell*

v. *City of Scranton*, 227 Pa. 604, 76 Atl. 505; *Kayser v. Trustees of Bremen*, 16 Mo. 88; *School District v. Hodgins*, 180 Mo. 70, 79 S. W. 148; *Gardiner v. Benn*, 81 Kan. 442, 905, 105 Pac. 435; *Hatch v. Consumers' Co.*, 17 Idaho, 204, 40 L. R. A. (n. s.) 263, 104 Pac. 670; *Meffert v. Brown*, 132 Ky. 201, 116 S. W. 779, 1177.)

We believe that a fair construction of section 3214, Revised Codes, gives the city council authority to annex portions of unplatted ground together with platted additions, provided the proposed annexation is not disapproved by a majority of the resident property owners. It is true that the statute provides that maps or plats of the ground proposed to be annexed to a city must be on file in the office of the county clerk and recorder of the county in which the ground is situated. The plaintiff in his complaint alleges that no maps or plats of certain mining claims named had been placed on file. The burden to sustain this allegation was on him. This burden he failed to sustain, for nowhere in the record, either by evidence or stipulation, does it appear that the owners of said mining claims or unplatted ground had failed to file maps with the county clerk and recorder. (McQuillin on Municipal Corporations, sec. 286; *Chandler v. Kokomo*, 137 Ind. 295, 36 N. E. 847.)

Messrs. Edwin M. Lamb and George B. Lesage, for Respondent, submitted a brief; Mr. Lamb argued the cause orally.

"Ordinances annexing or detaching territory must be passed as required by statute, otherwise the proceedings are void. \* \* \* And an ordinance annexing territory, part of which is subdivided into lots and part not so subdivided, is void *in toto* where the statute provides that only subdivided territory may be annexed in this manner." (28 Cyc. 200, 201; *Strosser v. City of Ft. Wayne*, 100 Ind. 433; *Forsyth v. City of Hammond*, 142 Ind. 505, 30 L. R. A. 576, 40 N. E. 267, 41 N. E. 950; *Chicago, B. & R. Co. v. City of Nebraska*, 53 Neb. 453, 73 N. W. 952; *State ex rel. Dawson v. City of Wichita*, 88 Kan. 375, 128 Pac. 369; *Armstrong v. City of Topeka*, 36 Kan.

432, 13 Pac. 843; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Union Pac. Ry. Co. v. City of Kansas*, 42 Kan. 497, 22 Pac. 633; 20 Am. & Eng. Ency. of Law, 2d ed., p. 1153.)

"If annexation or other like proceedings are absolutely void as for want of jurisdiction or for failure to comply with jurisdictional requirements of the statute, they are subject to collateral attack." (28 Cyc. 213; see, also, *Forsyth v. City of Hammond*, 142 Ind. 505, 30 L. R. A. 576, 40 N. E. 267, 41 N. E. 950; *City of Denver v. Coulehan*, 20 Colo. 471, 27 L. R. A. 751, 39 Pac. 425.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1913 the city of Butte undertook to extend its boundaries so as to include a portion of the southeast quarter, section 11, and the west half of southwest quarter, section 12, township 3 north, range 8 west. One-half of this area was platted into lots and blocks, while the remaining portion was unplatted. At the instance of a resident freeholder of the district, the trial court held the city's proceedings void and enjoined the exercise of any municipal authority over the proposed addition, and the city appealed. Two questions only are presented: (1) May a city of this state extend its boundaries so as to include unplatted ground? (2) Has plaintiff invoked an available remedy?

1. It is the rule in this state that a city has only such powers [1] as are expressly conferred or are necessarily implied (*City of Helena v. Kent*, 32 Mont. 279, 4 Ann. Cas. 235, 80 Pac. 258; *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695), and whenever there is a fair and reasonable doubt of the existence of a particular power, the doubt will be resolved against the municipality and the exercise of the power withheld. (*Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Helena etc. Ry. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446.)

The only warrant for the authority sought to be exercised by [2] the city in this instance is found in section 3214, Revised Codes, which provides: "That any tracts or parcels of land, which have been or may hereafter be, platted into lots or blocks, streets and alleys, and the map or plat thereof filed in the office of the county clerk and recorder of the county in which the same is situated, and shall be contiguous to any incorporated city or town, may be embraced within the corporate limits thereof, and the boundaries of such city or town extended so as to include the same in the following manner: When in the judgment of any city or town council, expressed by resolution duly and regularly passed and adopted, it will be to the best interest of such city or town, and the inhabitants thereof, and of the inhabitants of any contiguous *platted tracts or parcels* of land, as aforesaid, that the boundaries of such city or town shall be extended, so as to include the same within the corporate limits thereof, the city or town clerk of such city or town shall forthwith cause to be published in the newspaper, published nearest such platted tracts or parcels of land, at least once a week for two successive weeks, a notice," etc.

It is unnecessary to enter upon any extended discussion of the meaning of this statute. The language does not admit of the application of any rules of construction or interpretation. In terms too plain to admit of doubt, it declares that before any territory is eligible for incorporation in a city by the extension of the city's boundaries to include it, such territory must be (a) platted into lots or blocks, streets and alleys; (b) a map or plat thereof must be on file with the county clerk and recorder; and (c) the territory must be contiguous to the city's limits. If further evidence were needed that we have accurately expressed the intention of the legislature, it will be found in the history of the statute itself. Section 3214 is section 1 of an Act approved February 21, 1905 (Laws 1905, p. 62), entitled: "An Act to provide for the extension of the boundaries of any incorporated city or town so as to embrace and include contiguous platted tracts or parcels of land, and repealing sec-



tion 4726 of the Political Code of Montana." This section was intended as a substitute for section 4726, which it repeals and which provided for the annexation of "abutting and contiguous territory," without reference to whether it was platted or otherwise adapted to city or town purposes. Some of the disagreeable consequences following the exercise of the power apparently conferred by that section, and the incorporation within the exterior boundaries of a city of ground not platted and not intended for use as other property within the city, were illustrated in *Farlin v. Hill*, 27 Mont. 27, 69 Pac. 237. When we consider that the legislature which substituted section 3214, above, for section 4726, acted in view of the decision in *Farlin v. Hill* and deliberately changed the descriptive language from "abutting and contiguous territory" to "contiguous platted tracts or parcels of land," to then hold that it was still the intention to permit the corporate limits of a city or town to be extended so as to include unplatted ground, would impeach the intelligence of the legislators and render absolutely meaningless the language they employed. The first question must be answered in the negative.

2. The proceedings for the annexation of this territory were [3] valid or void *in toto*. Section 3214 provides for an expression of approval or disapproval by the resident freeholders of the territory sought to be annexed, and such expression was had in this instance; but the opinion was obtained upon the proposition to include all of the property mentioned above and not merely the platted portion. Indeed, it does not appear from the city's proceedings that the platted portion is even contiguous to the city's limits; and since it was not within the power of the city to include the entire tract, the proceedings were void from the beginning. This is in harmony with the general rule as expressed in 28 Cyc. 201, as follows: "An ordinance annexing territory, part of which is subdivided into lots and part not so subdivided, is void *in toto* where the statute provides that only subdivided territory may be annexed in this manner."

In the resolution adopted by the city council the property [4] is described as "contiguous platted tracts or parcels of land," and it is urged by counsel for the city that since the proceedings appear to be regular on the face, they are not subject to collateral attack. For the purposes of this appeal we may agree with counsel to that extent, but we do not agree with them that in the present suit plaintiff is making a collateral attack. The complaint recites in detail all the proceedings before the city council; describes the territory in controversy as it was described in the resolution, which was the foundation for the city's proceeding (substitute for Council Resolution No. 1011); alleges that a large portion of the territory has never been platted nor any map or plat thereof filed with the county clerk and recorder of Silver Bow county, and that more than fifty per cent of the resident freeholders of the territory expressed their disapproval to the city council. The prayer is that substitute for Council Resolution No. 1011 be declared to be void, that the property of plaintiff and others similarly situated be decreed to be without the city limits, and that the city be enjoined from exercising jurisdiction over the persons or property within the territory mentioned. The decree follows substantially this prayer. That this is a direct and not a collateral attack upon the city's proceedings does not admit of doubt. (*Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064; 23 Cyc. 1062.)

We are not aware of any statutory remedy conferred upon [5] the resident freeholder who objects to having his property included within the city's limits, and until the time arrives for final action by the city council he is not in a position to complain, for he cannot know what action the city will take until it has examined and considered the expressions of approval or disapproval by the resident freeholders of the territory affected, and section 3214 above contemplates that at the same meeting at which such expressions are submitted for the council's consideration, final action shall be taken. So that unless a suit in equity to have the proceeding annulled and the city restrained

from exercising authority over the proposed extension, is available, the objecting freeholder is remediless. It may be that, as a matter of public policy, a private citizen will not be heard to call in question the city's proceedings for minor irregularities or informalities; but where such proceedings are void *ab initio* for want of jurisdiction of the subject matter, as here, equity will afford relief to the property owner whose taxes would be increased if his property were included within the city's limits. (1 Spelling on Injunction and Other Extraordinary Remedies, sec. 719; 28 Cyc. 212, 213.) Upon principle, the decision in *Barnard Realty Co. v. City of Butte*, 50 Mont. 159, 145 Pac. 946, is decisive of this question.

The recital in the council resolution that this territory was [6] contiguous and platted, when such was not the fact, cannot inure to the city's benefit or preclude the plaintiff from any available remedy he would otherwise have. (*Forsythe v. City of Hammond*, 142 Ind. 505, 30 L. R. A. 576, 40 N. E. 267, 41 N. E. 950.)

The second question must be answered in the affirmative.

The decree entered by the trial court perpetually enjoins the [7] city, its officers and agents from assuming or exercising jurisdiction over the persons or property within this territory. The words, "in virtue of this proceeding," or their equivalent, should have been added; but when the decree is construed in the light of the pleadings, as it must be, it cannot be held to mean more than if such limiting terms had been employed. The error is more apparent than real, and harmless in any event.

The judgment and order denying a new trial are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

DUNNE, AS GUARDIAN, RESPONDENT, v. YUND ET AL.,  
APPELLANTS.

(No. 3,552.)

(Submitted January 4, 1916. Decided February 7, 1916.)

[155 Pac. 273.]

*Equity—Remedy at Law—Res Judicata—Real Property—Sales—Mortgages—Fraud—Judgments—Annulment.*

**Equity—Remedy at Law—Failure to Pursue—Effect.**

1. Where the owner of land who had conveyed it with an agreement that the grantee should reconvey to him upon payment of a debt owed by him to the grantee, permitted his default to be entered in an action by the grantee to have the agreement to reconvey canceled because of the failure of the grantor to make payment, and thereafter neither he nor his guardian, subsequently appointed, asked to have the default set aside, the decree in favor of plaintiff became final and could not be set aside except for fraud, knowledge of which was ascertained after the time had expired within which such legal remedy might have been invoked.

**Real Property—Sales—Contract to Reconvey—Mortgages.**

2. The owner of realty may sell it and receive back an agreement for a reconveyance the consideration for which is a pre-existing debt, without establishing the relation of mortgagor and mortgagee, the effect of the transaction—as to whether it constitutes a sale or a mortgage—depending upon the intention of the parties to be ascertained from the attendant circumstances.

**Same—Decree—Annulment.**

3. A party who, having ample time to prepare and interpose his defense that an ostensible sale of realty was in fact intended as a mortgage, omits to interpose it, cannot, in the absence of fraud by his opponent by which he was deprived of his day in court, subsequently impeach the decree on the ground that an erroneous conclusion was reached.

**Same—Decree—Annulment—Fraud.**

4. Suppression of the truth relating to the circumstances attending a transfer of realty, claimed by the seller to have been intended as a mortgage and not a sale, does not constitute the character of fraud for which equity will set aside a decree; the fraud in respect to which such relief will be granted must have been perpetrated by the adversary of the complaining party in some matter collateral to the issue tried, by which he was prevented from having a full hearing.

[As to absolute deed in form intended as mortgage, see note in 129 Am. St. Rep. 1137.]

On the question of jurisdiction of equity to cancel instrument notwithstanding remedy at law, see note in 5 L. R. A. (n. s.) 1048.

As to right to foreclose deed intended as security for debt, as an equitable mortgage, see note in 22 L. R. A. (n. s.) 572.

The question of whether a deed absolute on its face but intended as a mortgage conveys legal title is discussed in a note in 11 L. R. A. 209.

*Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.*

SUIT by Orson H. Dunne, an incompetent, by Anna L. Dunne, his guardian, against Ida Yund and others. From a decree in favor of plaintiff, defendants appeal. Reversed, with directions to dismiss the action.

*Messrs. James A. Walsh and William T. Pigott, for Appellants, submitted a brief; Mr. Pigott argued the cause orally.*

The doctrines of equity jurisprudence forbid the granting of any relief because the statutory legal remedy was adequate. (*Wilson v. Harris*, 21 Mont. 374, 400, 54 Pac. 46; *Vantilburg v. Black*, 3 Mont. 459; *McCormick v. Hubbell*, 4 Mont. 87, 5 Pac. 314; *Baer v. Higson*, 26 Utah, 78, 72 Pac. 180; *Ede v. Hazen*, 61 Cal. 360; *Kloke v. Gardels*, 52 Neb. 117, 71 N. W. 955; *Kitzman v. Minnesota Thresher Mfg. Co.*, 10 N. D. 26, 84 N. W. 585.)

The judgment in the case of *Yund v. Dunne* is a complete bar to the maintenance of this suit. (*Reeder v. Reeder*, 68 Or. 163, 135 Pac. 176, 137 Pac. 191; *Lokowich v. City of Helena*, 46 Mont. 575, 129 Pac. 1063; *State v. District Court*, 34 Mont. 258, 86 Pac. 798; *Dunseth v. Butte & El. R. Co.*, 41 Mont. 14, 21 Ann. Cas. 1258, 108 Pac. 567; *Reich v. Cochran*, 151 N. Y. 122, 56 Am. St. Rep. 607, 57 L. R. A. 805, 45 N. E. 367; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Allen v. Allen*, 159 Cal. 197, 113 Pac. 160; *Olson v. Title Trust Co.*, 58 Wash. 599, 109 Pac. 49; *Suisun Lumber Co. v. Fairfield School District*, 19 Cal. App. 587, 127 Pac. 349; *Woolverton v. Baker*, 98 Cal. 628, 33 Pac. 731; *Quirk v. Rooney*, 130 Cal. 505, 62 Pac. 825; *Commissioners of Marion County v. Welch*, 40 Kan. 767, 20 Pac. 484; *Mound City v. Castleman*, 187 Fed. 921, 110 C. C. A. 55; *Jackson v. Lodge*, 36 Cal. 28; *Dowell v. Applegate*, 152 U. S. 327, 38 L. Ed. 463, 14 Sup. Ct. Rep. 611.) "A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked." (1 Bouv. Inst., n. 840; 2

Bouv. Law Dict. 155.) This principle is as well settled as is the principle that a judgment is a bar to another action between the same parties upon the same cause of action. (*United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537; *Heinrichsen v. Van Winkle*, 27 Ill. 334.)

*Mr. Wellington D. Rankin*, for Respondent, submitted a brief and argued the cause orally.

A mortgage can be foreclosed only by a judicial foreclosure and sale. (*First Nat. Bank v. Bell Silver & Copper M. Co.*, 8 Mont. 32, 19 Pac. 403; *Reynolds v. London & L. Fire Ins. Co.*, 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467; *McCaughey v. McDuffie*, 7 Cal. Unrep. 175, 74 Pac. 751; *Byrne v. Hudson*, 127 Cal. 254, 59 Pac. 597; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164.) The same method of foreclosure obtains in the case of an absolute deed intended as security, as in the case of a mortgage in the ordinary form. (*McCaughey v. McDuffie*, *supra*; *Grover v. Hawthorne*, 62 Or. 77, 114 Pac. 472, 121 Pac. 808; *Caro v. Wollenberg*, 68 Or. 420, 136 Pac. 866; *Krauss v. Potts*, 38 Okl. 674, 135 Pac. 362.)

The mortgagor may redeem at any time before his right of redemption is foreclosed. (Sec. 5723, Rev. Codes.) This section has been so construed in the case of *Grogan v. Valley Trading Co.*, 30 Mont. 229, 236, 76 Pac. 211; see, also, *Balduff v. Griswold*, 9 Okl. 438, 60 Pac. 223, where an identical section was construed.

A mortgagee cannot maintain a suit to quiet title and thereby foreclose the mortgage. (*Fields v. Cobbey*, 22 Utah, 415, 62 Pac. 1020; *Peninsular Naval Stores Co. v. Cox*, 57 Fla. 505, 49 South. 191.) By implication this court has held that a mortgage cannot be foreclosed by a suit to quiet title, in the case of *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76. It appears from the case of *Fields v. Cobbey*, *supra*, that a court in a suit to quiet title is without jurisdiction to foreclose a mortgage. The court in the case of *Yund v. Dunne* did not have

jurisdiction to foreclose the mortgage in the suit to quiet title. The court in that action was in possession of sufficient facts from the record to know that the transaction on its face was a mortgage. A contract of reconveyance made at the same date as a deed is a circumstance tending to show that the transaction was a mortgage; the general criterion being the existence or nonexistence of a continuing debt. (3 Pomeroy's Equity Jurisprudence, sec. 1195.) A similar transaction to the one at bar has been held to be a mortgage upon the face of the papers themselves by the supreme court of California in the case of *Baker v. Firemen's Fund Ins. Co.*, 79 Cal. 34, 21 Pac. 357.

That a court of equity may at any time set aside a judgment entered by a court without jurisdiction is well established. (*State ex rel. Happel v. District Court*, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (n. s.) 1098, 99 Pac. 291; *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824; *Iowa Savings & Loan Assn. v. Chase*, 118 Iowa, 51, 91 N. W. 807; *Combs v. Sewell*, 22 Ky. Law Rep. 1026, 59 S. W. 526.) A judgment rendered by a court without jurisdiction is void, and cannot form the basis of a plea of *res judicata*. (*Quaker Realty Co. v. Maier-Watt Realty Co.*, 134 La. 1030, 64 South. 897.)

A court of equity will grant relief from a judgment obtained through fraud or concealment. (*Mosby v. Gisborn*, 17 Utah, 257, 54 Pac. 121; *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789; *Schneider v. Lobingier*, 82 Neb. 174, 117 N. W. 473; *Ewing v. Lamphere*, 147 Mich. 659, 118 Am. St. Rep. 563, 111 N. W. 187.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On July 26, 1909, Orson H. Dunne, the plaintiff, was the owner of 1,279.65 acres of farm land situate in Lewis and Clark county. He was indebted to Jacob A. Yund in the sum of \$3,000. On that date, by warranty deed, he conveyed all of these lands to Yund. At the same time Yund and his wife,

Ida, entered into a written agreement with plaintiff to reconvey to him the lands upon these conditions: That he would pay to them at the expiration of three years the sum of \$3,000; that he would annually pay interest on this sum at the rate of eight per cent per annum, and all taxes, assessments, *etc.*, then due or to become due during the existence of the agreement. It was stipulated that if plaintiff failed to meet any of the payments, including interest, when due, Yund and his wife, if they so elected, might declare the whole amount of indebtedness due, and, at their option, forfeit and terminate the agreement by giving ninety days' notice in writing of their intention to do so, setting forth in the notice the amount due and the time and place when and where payment must be made. The giving of notice and the failure of plaintiff to meet his obligation was declared sufficient to terminate the agreement and release Yund and wife from all obligations under it, to forfeit all right of plaintiff to have a reconveyance and all payments theretofore made by him, and to entitle Yund and his wife to enter and take possession. Time of payment was made an essential part of the agreement, and all of its terms were made obligatory upon the heirs, administrators, and assigns of the parties. On March 28, 1910, Yund died testate, and thereafter his estate was distributed under the terms of his will to Ida, his surviving widow, Walter S. Yund and Laretta V. Yund, his children, all of whom are made defendants. On June 15, 1912, these defendants brought an action in the district court of Lewis and Clark county to obtain a decree directing a cancellation of the agreement, on the ground that it had been forfeited, because plaintiff had failed to comply with its terms, and awarding to them the possession of the lands. On September 12, 1912, plaintiff having failed to answer, his default was entered. Thereupon these defendants submitted their evidence, and the court rendered and caused to be entered a decree granting the relief demanded. On December 7, 1912, these defendants by warranty deed conveyed the lands to defendants Sieben and Grimes. On February 26, 1913, upon the petition of Anna L.



Dunne and others, filed in the district court of Lewis and Clark county, the plaintiff was adjudged to be incompetent, and on March 1 Anna L. Dunne was appointed and qualified as guardian of his person and estate. Thereupon this action was brought by him, through his guardian, to have the decree of September 12, 1912, annulled, to have himself decreed to be the owner of the land, to have his deed to Yund and his wife declared a mortgage, and to compel Sieben and Grimes to make conveyance to him upon his payment of \$3,000, the amount of the mortgage debt, together with interest, taxes, *etc.*

Besides narrating a history of events as above set forth, the complaint alleges, in substance, the following: That at the time the transaction occurred between the plaintiff and Yund and wife, the plaintiff was financially embarrassed and needed money; that he was incompetent and unable to attend to his business affairs properly; that the deed to Yund was intended as a mortgage to secure the payment of money theretofore and at that time borrowed from Yund to the amount of \$3,000; that these facts were known to the defendants Yund when they brought the action which resulted in the decree of September, 1912, as well as to Sieben and Grimes when they accepted their deed from their codefendants; that the facts showing the intention of Yund and wife and plaintiff were not disclosed to the court; that the purpose of defendants Yund in bringing the action and securing the decree was to foreclose plaintiff's equity of redemption, and thus fraudulently to obtain title to the lands for \$3,000, whereas in fact they were worth \$17,000. The defendants deny all these allegations, and allege that the issues in that case were the same as those presented herein, and that plaintiff is estopped by the decree from asserting any claim to the lands.

The court found that the allegations of the complaint were true, with these exceptions: With reference to the allegations that there was a great disparity in the amount of indebtedness due the Yunds and the value of the lands, that the plaintiff was in straitened circumstances, and that the defendants were

guilty of fraud, it made no findings. It found that plaintiff was not insane or incompetent to attend to business either when his conveyance was made or when the action was brought in which the decree was rendered. It found further that, when the action was brought, plaintiff was in default in the payment of interest and taxes, and that notice of ninety days had been given to plaintiff by the Yunds that they had elected to exercise their option under the agreement, and that unless he made payment according to its terms they would declare it forfeited; that plaintiff was personally served with summons in the action; that, though he did not formally appear therein, the time for answering was extended from time to time at his request until September 12, when the decree was rendered and entered; and that no appeal was taken therefrom, nor was any application for a new trial made nor any proceeding taken to have the default set aside and the decree vacated. Upon these findings it rendered a decree granting the relief demanded. The defendants have appealed. The appeal is submitted on the judgment-roll alone. The contention made is that the findings do not support the decree.

The district judge evidently entertained the opinion that, since the evidence at the trial disclosed that the transaction between Yund and wife and plaintiff constituted a mortgage, the decree of September 12 was void because, the relation of mortgagor and mortgagee having once been established, the mortgagor's right of redemption could not be taken away in any other manner than by an action in foreclosure under the provisions of the statute. (Rev. Codes, sec. 6861.) That this is so is made clear by his omission to make any finding with reference to the value of the lands or the financial condition of plaintiff or upon the question of fraud, and also by the following conclusion of law which is made the basis of the decree: "That in order to deprive the said Orson H. Dunne of said rights as mortgagor to and of his ownership in said property, foreclosure of said mortgage would be and is necessary; that said Orson H. Dunne owns said lands subject to the lien of said mortgage

and the right of said defendants to foreclose the same; \* \* \* that upon foreclosure said Dunne has and will have all the rights of redemption provided by law."

Upon the assumption that it was within the power of the court to render the decree of September, 1912, in the action as [1] it was presented to it, the trial court was without power to grant relief in this case. When the action was brought, plaintiff was competent. He was personally served with summons and a copy of the complaint, and was therefore informed of the nature of the claim made by the Yunds. He nevertheless permitted his default to be entered and the decree to be rendered. It does not appear that the Yunds did any act to prevent him from setting up the defense that the transaction was intended as a mortgage. If this had been the case, or the default had been entered through his mistake, inadvertence, surprise or excusable neglect, he had an adequate remedy under the statute (Rev. Codes, sec. 6589) which he could have invoked. Even after he was adjudged incompetent, his guardian could have invoked it in his behalf. Both having omitted to invoke it and no excuse for the omission appearing, the decree, though it be conceded that it was erroneous, became effective, and the court could not entertain an action to set it aside, except for fraud, knowledge of which was ascertained by plaintiff or his guardian after the time had expired within which the legal remedy might have been invoked. This rule is founded upon the elementary principle that, when one has an adequate remedy at law, a court of equity has no jurisdiction to grant him relief. The principle is recognized by the courts generally. (*Vantilburg v. Black*, 3 Mont. 459; *McCormick v. Hubbell*, 4 Mont. 87, 5 Pac. 314; *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46; *Baer v. Higson*, 26 Utah, 78, 72 Pac. 180; *Ede v. Hazen*, 61 Cal. 360; *Kloke v. Gardels*, 52 Neb. 117, 71 N. W. 955; *Kitzman v. Minnesota Thresher Mfg. Co.*, 10 N. D. 26, 84 N. W. 585; *Wieland v. Shillock*, 23 Minn. 227; 11 Ency. Pl. & Pr. 1187.) These authorities are all based upon statutes similar to section 6589, *supra*, and, upon the assumption that the decree in question is valid,

are conclusive upon plaintiff's right to relief; for this case is one in which, upon the facts found, the plaintiff had an adequate remedy at law which he failed, without excuse, to avail himself of when he had full opportunity to do so.

It remains to inquire whether the decree was such as the court [2] might have rendered. Counsel for plaintiff, in order to sustain the decree in this case, invokes the principle that, when the relation of mortgagor and mortgagee has once been established between the parties, the right of redemption is vested in the mortgagor regardless of stipulations of the parties to the contrary, and insists that the court was without jurisdiction to render the decree of September, 1912. In support of his contention, he cites section 5715 of the Revised Codes, which declares: "All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void." He also relies on section 6861, which provides: "There is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter," *etc.* He argues that, under these provisions, no matter what form an action may assume, if in fact the relation of mortgagor and mortgagee exists between the parties, the court is without power to adjust their rights except by foreclosure as provided in section 6861, and that, though these rights have once been adjusted by decree, the decree may be avoided by an independent action, even though it was rendered by consent or because the court rendering it did not know or erroneously concluded that the relation did not in fact exist. It is competent for one person to sell land to another and receive an agreement for a reconveyance, even though the consideration for the sale is a pre-existing debt, without establishing the relation of mortgagor and mortgagee. In many cases, indeed in most in which the question arises whether the particular transaction discloses this relation, the fact depends, not upon a construction of the writings executed at the time, but

upon the intention of the parties, to be ascertained from the attendant circumstances. The result of the particular transaction, like the one here, will be held to be a sale with an agreement to reconvey, or to establish the relation of mortgagor and mortgagee, according as the proof of the attendant circumstances tends to show that the one or the other was the purpose of the parties. (*Gassert v. Bogk*, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281; *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211; *Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507; *Murray v. Butte-Monitor Tunnel Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132.) The fact that the court, in adjusting the rights [3] of the parties, reaches an erroneous conclusion that there was no mortgage when in truth there was one, in no wise affects the validity of the result. If the parties have been accorded a full hearing at an adversary trial or the opportunity to have such a hearing has been afforded, the result is binding on both, and neither can thereafter impeach it on the ground that the court reached an erroneous conclusion. The action resulting in the decree of September, 1912, was brought upon the theory that the transaction between the plaintiff and Yund and wife was a sale with an agreement to reconvey. The complaint stated a cause of action upon that theory. Plaintiff, being then competent, had full knowledge of the fact that the defendants Yund were making this claim. Though he had ample time to prepare and interpose the defense that he was a mortgagor of the property and not a purchaser under the agreement to reconvey, he failed to interpose it. In the absence of fraud by the Yunds or some act on their part by which he was deprived of his day in court, the decree became conclusive against him. Under the circumstances, the provisions found in the statutes *supra* were defensive weapons to be used by the plaintiff, at his option, to protect his rights, and not limitations upon the power of the court to decide the case as it was presented. His neglect to use them may not now be alleged as a reason why the result should be set aside. "Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order.

This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded." (*Le Guen v. Gouverneur & Kemple*, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121.) The rule here stated is found embodied in the Revised Codes, in sections 7914 and 7917, and has many times been recognized and applied by this court. (*State ex rel. Pool v. District Court*, 34 Mont. 258, 86 Pac. 798; *Dunseth v. Butte El. Ry. Co.*, 41 Mont. 14, 21 Ann. Cas. 1258, 108 Pac. 567; *Lokowich v. City of Helena*, 46 Mont. 575, 129 Pac. 1063; *Peterson v. City of Butte*, ante, p. 13, 155 Pac. 265.

It does not aid the plaintiff, if it be conceded that the Yunds [4] failed to disclose to the court, either in their complaint or by their proof, all the circumstances attending the transaction between plaintiff and Yund and wife. Let it be assumed that the defendants Yund purposely suppressed the truth relating to it. This did not constitute the character of fraud against which a court of equity will grant relief. To have a decree set aside for fraud, it is necessary for the complaining party to allege and prove fraudulent acts by his adversary in some matter collateral to the issue on trial, by which he was prevented from having a hearing. "The fraud in respect to which relief will be granted in any case must have been practiced upon the unsuccessful party, with the result that he has been prevented from fully and fairly presenting his case for consideration. In short, the situation in the case must have been such that there has never been a decision in a real contest over the matter in controversy." (*Kennedy v. Dickie*, 34 Mont. 205, 85 Pac. 982.) In other words, the fraud must have been extrinsic and collateral to the matter tried in the former action, and not in a matter tried upon its merits and upon which the decision was rendered. That the offending party imposed upon the court, that he procured his judgment upon a forged instrument or by the use of perjured testimony, or other similar fraud, cannot avail. The possibility of the presence of this character of fraud

is always to be anticipated, and each party must be prepared to meet and expose it then and there. If he fails to do this, he cannot thereafter question the validity of the result. (*Kennedy v. Dickie, supra*, and cases cited.) The action by the defendants Yund necessarily involved the right to have the agreement canceled as a forfeited contract of sale. It necessarily involved plaintiff's right of redemption. This left the case open to him to interpose his defenses. By remaining silent and refraining from making use of them he impliedly agreed that the claim of the Yunds was proper, and he cannot now be heard to assert the contrary.

The decree is reversed, and the district court is directed to dismiss the action.

*Reversed, with directions.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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CUSTER CON. MINES CO., RESPONDENT, v. CITY OF  
HELENA ET AL., APPELLANTS.

(No. 3,590.)

(Submitted January 8, 1916. Decided February 9, 1916.)

[156 Pac. 1090.]

*Water and Water Rights—Deeds—Loss—Evidence—Recordation—Presumptions—Vendor and Purchaser—Unrecorded Deed—Notice—Appurtenances—Title by Prescription.*

*Water Rights—Deeds—Loss—Evidence—Sufficiency.*

1. Evidence in a water right suit *held* sufficient to show the conveyance of the right by deed claimed to have been lost.

*Same—Recordation of Deeds—Presumptions.*

2. Under section 4684, Revised Codes, making any unrecorded conveyance void as against subsequent purchasers or encumbrancers, it is presumed that the holder of the prior recorded title acquired the entire estate, unless he had, or was chargeable with, notice.

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The question of possession of vendee under unrecorded deed as notice of title is discussed in a comprehensive note in 13 L. E. A. (n. s.) 109.

Same—Vendor and Purchaser—Unrecorded Deed—Constructive Notice.

3. A use of water for mill and smelter purposes, through a ditch and pipe-line which were prominent, open and visible to any person passing along the ditch, was sufficient to put a purchaser upon notice; the burden of establishing such use being upon the claimant.

Same—Constructive Notice—Evidence—Sufficiency.

4. Evidence held insufficient to establish constructive notice in defendant city of an unrecorded grant of a portion of a water right made prior to its purchase of the entire right by defendant.

Same—Possession—Notice of Unrecorded Grant.

5. Possession of real property or a water right which will amount to notice of an unrecorded grant thereof must be under such grant, unequivocal, inconsistent with the title of the apparent owner of record, and of such a character that an intending purchaser could, by making inquiry, learn of the unrecorded grant.

Same—Appurtenances—Deed—Burden of Proof.

6. In order that a deed conveying land with appurtenances may convey a water right, such right must have been appurtenant to the land at the time of the conveyance, and the burden of showing such to have been the fact was upon the grantee.

Same—Appurtenances—Conveyances.

7. Where a water right was not granted for any certain purpose or for use on any particular land, it did not become an appurtenance by the terms of the deed, and could not thereafter be conveyed as an appurtenance unless the grantee had given it that character by using it with, and for the benefit of, the land.

Same—Appurtenances—Conveyance.

8. Evidence held insufficient to show that a water right conveyed by deed was thereafter so used in connection with certain lands as to become appurtenant thereto and pass by mere general deed of the land and its appurtenances.

Same—Title by Prescription—Evidence—Insufficiency.

9. Under the rule that, to maintain title to a water right by prescription, the grantee must prove that for ten years the right or some definite portion thereof was in his possession or that of his grantors, and that such possession was open, notorious, exclusive and adverse to the claim of the defendant and under a claim of right, the evidence held insufficient to support such a title.

Same—Who may not Question Right to Lease.

10. One not asserting any interest in a water right decreed to be owned by defendant city, was in no position to question the right of the city to lease it.

[As to what passes as an appurtenance, see note in 81 Am. St. Rep. 765.]

*Appeal from District Court, Broadwater County, Fourteenth Judicial District; Roy E. Ayers, Judge of the Tenth District, presiding.*

ACTION by the Custer Consolidated Mines Company against the City of Helena, in which the Spokane Ranch & Water Company intervened. Judgment for plaintiff and defendant and intervener appeal. Reversed and remanded.



*Messrs. Walsh, Nolan & Scallon, Mr. H. S. Hepner and Mr. Lincoln Working*, for Appellants, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

*Mr. R. Lee Word, Messrs. Hartman & Hartman and Mr. James A. Walsh*, for Respondent, submitted a brief; *Mr. Walter S. Hartman* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The subject matter of this suit is the right of the respondent to the use and enjoyment of 50 inches of the waters of Beaver creek, Broadwater county, this state, as of date October 1, 1865. It was found and decreed by the district court that the respondent has such right subject to certain prior rights of the appellant city of Helena, but superior to certain other rights of said city to such waters. The question presented upon this appeal is whether the record justifies this award to the respondent.

The respondent asserts as the basis of its claim that it is now, and for many years last past it and its grantors have been, the owners and in possession of the "H. & H." and "Custer" mines, with mill sites and other real estate situate in the valley of Beaver creek, for which water is needed for irrigation, domestic, and mining purposes; that on October 1, 1865, the Murray Placer Mining Company made due appropriation of 1,000 inches of the waters of said Beaver creek for placer mining and other beneficial purposes; that in 1881 said appropriators were desirous of crossing the lands now owned by the respondent, with a ditch known as the Indian creek ditch, for the purpose of carrying the waters so appropriated to certain places of intended use, and in consideration of permission so to do given by James H. Halford and George W. Cleveland, then the owners of said premises, sold and conveyed to such owners "a perpetual right to use and of the use and enjoyment of 50 inches of the waters of said Beaver creek so appropriated as aforesaid and to be conveyed through the said ditch then in course of construction"; that the ditch was constructed and used

for the purposes intended, and from it Halford and Cleveland took and used the 50 inches of water so conveyed to them "for irrigation on part of the lands aforesaid, for domestic purposes, for the use of stock, and for other beneficial purposes," so that the said water became appurtenant to said lands; that said lands and water right have by mesne conveyances become vested in respondent; that since 1881 the respondent and its predecessors in interest have continuously used said 50 inches of water for irrigation, stock, domestic and other useful purposes, which use has been open, notorious, exclusive and adverse as against the city of Helena and its predecessors in interest under a claim of right.

The appellant Spokane Ranch & Water Company is merely a lessee, and its rights are entirely bound up in that of the appellant city of Helena. The latter contests the award to the respondent as unjustified, because: (1) There is not sufficient proof of the alleged conveyance to Cleveland and Halford; (2) if such conveyance was made, it was never recorded, and cannot prevail over the claim of the city as a *bona fide* purchaser; (3) if such conveyance was made, there is not sufficient proof to show that Cleveland and Halford were ever divested of the right so conveyed; (4) neither evidence nor finding warrants any claim of title by prescription.

1. It is conceded in the pleadings that the Indian creek ditch [1] was constructed in 1881 by persons who then held a right as of October 1, 1865, to 1,000 inches of the waters of Beaver creek. These persons are alleged in the complaint to be the predecessors in interest of both the respondent and the city, while the answer admits that they were the predecessors in interest of the city. The evidence on behalf of the respondent tends to show that these persons were John Murray and Joseph McElroy, calling themselves the Murray Placer Mining Company; that the Indian creek ditch crosses the lands of the respondent, which lands were in 1881 the property of James Halford and George W. Cleveland; that Charles S. Muffy, the respondent's managing officer and immediate grantor, saw on

several occasions among the archives of the property—first in 1904—a deed bearing date in the year 1881, written by the hand of John Shober, of Helena, and duly acknowledged, which purported to be executed by the Murray Placer Mining Company, John Murray, and Joseph McElroy, and to “grant, bargain, sell, and convey” to James H. Halford and George W. Cleveland fifty inches of water out of the Indian creek ditch for the consideration of \$1 and permission given by Halford and Cleveland to cross the lands with the Indian creek ditch, which deed was never recorded, was abstracted from the archives of the property, and cannot be found; that in 1905 Walter Larson saw in the possession of Mr. Muffy, and read, a deed written in longhand on legal cap paper, which purported to convey fifty inches of Beaver creek water “from the owners of the Indian creek ditch to the owner of the Custer mine,” signed by John Murray and another, running to Cleveland and another; that in 1881 John Shober, then a practicing attorney at Helena, drew in longhand, and either witnessed or took the acknowledgment of, a deed executed in his presence, signed by John Murray, Joseph McElroy and perhaps others, as grantors, running to George W. Cleveland, James Halford and perhaps others as grantees, for some right to water from Beaver creek, in consideration of the grantees allowing Murray to cross their lands with a ditch which he was then constructing; that at some time within eleven years after 1881, 1882, or 1883 Isaac Harrington, while cleaning out the Indian creek ditch saw a pipe in the Indian creek ditch at the Custer mines property, and, on reporting that fact to Murray, was told not to disturb it, as Murray had, through a deed written by John Shober, granted fifty inches to the Custer mine, and for him (Harrington) to always respect that right. It is arguable, of course, that these references are not to the same instrument; in which event we have the interesting alternative that more than one grant of the character claimed is suggested. We think, however, that the rational conclusion is that they do relate to one transfer; that the evidence, taken as a whole, meets all the requirements exacted by this court in *Capell*

v. *Fagan*, 30 Mont. 507, 2 Ann. Cas. 37, 77 Pac. 55, and that, if accepted, it justified the finding of a conveyance such as the respondent claims.

2. In our opinion, the pleadings do not permit a question that the city of Helena, by purchase in March, 1901, became vested with the record title to the entire 1,000-inch right above referred to, and out of which the unrecorded grant asserted by the respondent is carved. The conveyances to the city were duly [2] recorded, and at the time of such purchase and recordation there was not anything of record to show that any such grant had been made. Presumptively, therefore, the city acquired the entire right (Rev. Codes, sec. 4684), and such is actually the case unless the city had, or was chargeable with, notice of that grant (Rev. Codes, sec. 4687).

There is no claim of actual notice to the city of the unrecorded grant under which the respondent claims. The plea is that the [3] predecessors of the respondent, immediately after the grant to them of the fifty-inch right, "constructed a ditch and pipe-line tapping said Indian creek ditch, by means of which said 50 inches of water were diverted from said ditch" and conveyed to the lands, mills and concentrators now owned by the respondent; that said ditch and pipe-lines "were prominent, open and visible to any person passing along or in view of said Indian creek ditch"; that at the time of the purchase by the city such possession and use of said fifty inches of water was open, notorious and visible, and the city, by exercising reasonable diligence, could have learned that such possession and use were under a claim of right, and by proper inquiry could have ascertained the extent and nature of such right. The sufficiency of this is contested upon grounds of both law and fact. As to the law, it is vigorously argued that, since a water right is a mere right to the use of water (*Smith v. Denniff*, 24 Mont. 27, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398), possession of it in any manner capable of giving notice is impossible. If this be correct, there can be no such thing as title to a water right by prescription, since such title must be founded upon a posses-

sion no less open and tangible than the possession here pleaded; yet such title to a water right can be acquired. (*State v. Quantic*, 37 Mont. 32, 94 Pac. 491; *Smith v. Duff*, 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 981; *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751.) Difficulties in the way of proof there may be, but it seems to us perfectly clear that such use as respondent pleads ought to be enough to put a purchaser upon notice. The burden to establish it was, however, upon the respondent (*Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; *Sheldon v. Powell*, 31 Mont. 249, 107 Am. St. Rep. 429, 78 Pac. 491), and the serious question is whether the respondent has successfully carried that burden. What the precise condition was at the time of the city's purchase in 1901 is not too [4] clear. Regarding the use of water prior to that time, Harrington says, in effect, that at some time within eleven years after 1881, 1882 or 1883 he saw a pipe—length and diameter not given—in the Indian creek ditch at the Custer mines property. Bonathan deposes that from April, 1890, to June, 1898, the water for the company boarding-house was procured in the summer time by means of a three-inch pipe syphoned from the same ditch, that the superintendent's house was supplied through a syphon and his lawn and garden—not to exceed two acres in all—were irrigated through a gate in the ditch, and that there was another pipe-line from the ditch, but he does not know for what it was used. Duncan testifies that during a portion of the year from August, 1894, to August, 1895, when suitable water was not to be had from the Iron Age gulch, he saw water pumped from the Indian creek ditch through a pipe the intake of which was two inches, for the boilers and compressor at the Custer mine. Gulker claims that during the year 1897 to 1901 he saw water used on the superintendent's lawn, on Reis' lawn or garden, on Kramer's garden, in the stable, and in Bonathan's boarding-house kitchen, through pipes. Myers asserts that in 1899 he often crossed the Indian creek ditch and saw water used on the superintendent's lawn at the Custer mine, and saw pipes

in his house. Myles testifies that he saw water used by the Custer mines people every year after 1893 "on lawn, at the boarding-house, and things of that kind," such use being by means of a ditch to irrigate about one-half an acre, and three or four pipes which tapped the ditch at different places over a distance of about a quarter of a mile. Slates says that during the period from 1888 to 1904 he saw water used from the Indian creek ditch at the boarding-house in the summer, on the superintendent's lawn, at Kramer's house and garden through a three or four inch pipe, by Brewer for his garden also through a pipe, by Peter Reis for his lawn and small garden, and once through a pump for the boilers. Brewer's garden and Reis' lawn and garden were not on the respondent's property at all; while the superintendent's house was on the General Sherman lode. Assuming, however, that these uses were all in virtue of some relation to the then owner of the respondent's property and were in full blast when the city purchased in 1901, the sum total of it is this: An inquirer might then have seen that by means of one small waterway and some pipes stuck into or hung over the ditch, water had been diverted for the irrigation of a lawn or two and a small garden or two, and for supplying a house or two, and perhaps a stable, the entire quantity thus diverted being nowhere near fifty inches, and negligible as compared with the carrying capacity of the ditch. What further he could have learned by pursuing the inquiry is not disclosed. The record is barren of any intimation that he would or might have been informed of the claim of right, to say nothing of the unrecorded grant, while it is made to affirmatively appear from the testimony of the Clarks, then owner and superintendent, respectively, of the respondent's property, that the use in question was merely from convenience without knowledge of any grant and without claim of any right. We cannot convince ourselves that, under these circumstances, notice of the unrecorded grant is chargeable to the city. (Rev. Codes, secs. 6229, 8073.) The possession of real property which will amount to notice of an [5] unrecorded grant thereof must be under such grant, must

be unequivocal, inconsistent with the title of the apparent owner of record, and of such a character that an intending purchaser could, by following up the inquiry, learn of the unrecorded grant. (*Brown v. Volkening*, 64 N. Y. 76, 83; *Page v. Waring*, 76 N. Y. 463; *Crossen v. Oliver*, 37 Or. 514, 61 Pac. 885; *Sheldon v. Powell*, *supra*; *Mullins v. Butte Hardware Co.*, *supra*.)

3. Nowhere in respondent's chain of title from Cleveland and Halford is there any mention of the fifty-inch water right granted them by the unrecorded deed of Murray and McElroy; but it [6] is the claim of respondent that this right descended to it from Cleveland and Halford, by mesne conveyances, in virtue of the appurtenance clause contained in each of the deeds. For this to be tenable, the water right must have been appurtenant to the lands at the time they were conveyed by Cleveland and Halford, and the burden of showing such to be the fact was upon the respondent. (*Smith v. Denniff*, *supra*.) The deed from Murray and McElroy to Cleveland and Halford is characterized by Mr. Muffy as an absolute one; that is, as he distinctly says, the water right was not granted for any special purpose or for any particular lands. This being so, it was not an appurtenance by the terms of the deed, and it could not be conveyed as an appurtenance unless Cleveland and Halford gave it that designation and character by using it with and for the benefit of the land. (Rev. Codes, sec. 4429; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571; *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339.) This the evidence before us fails to show. [8] Cleveland and Halford were owners in severalty of two adjoining quartz lodes—Halford of the General Custer from October, 1881, to November 20, 1888, and Cleveland of the Aqua Frio from October, 1881, to March 5, 1889—which they were working through a common shaft; but there is nothing in the record to indicate that the fifty-inch right in question, or any part thereof, was ever used in connection with these mining operations, or was ever used by either of them for any purpose save as might be inferred from the statement of Harrington that at some time within eleven years of 1881, 1882, or 1883, and

while Cleveland and Halford were working the Custer mine, he saw a pipe in the Indian creek ditch at some point in its course across the mining ground. Counsel for respondent on page 39 of their brief concede that this is all, and assert that it is enough; but, when we consider that Harrington tells us nothing about the pipe, whether it was of a character and so placed as to be useful for carrying any substantial quantity of water, says distinctly that he never saw any water from the ditch used on the lands of Cleveland or Halford, does not speak of having seen any indications that any ever was so used, and does not intimate how, through the pipe he saw, it could have been used, it becomes impossible to conclude that the fifty-inch right became appurtenant to respondent's lands in the time of Cleveland and Halford. The suggestion is repeated in respondent's brief that the Indian creek ditch crosses respondent's property and is a burden upon it, as though that fact in some way stamped the water right granted in consideration of it as an appurtenance to the lands; but this circumstance is altogether indecisive, because it in no manner restricted the power of Murray and McElroy to grant, or of Cleveland and Halford to take, the fifty-inch right as an easement in gross, which in fact was done, according to Mr. Muffly.

4. This suit was begun in March, 1911, and to maintain the claim of title by prescription it was necessary for the respondent to prove that since March, 1901, the property claimed, to-wit, the fifty-inch right out of the Indian creek ditch, or some definite portion thereof, was in the possession of the respondent and its grantors, and that such possession was open, notorious, exclusive and adverse to the claim of the city and under a claim of right. Assuming, without deciding, that there was a use of some water under circumstances to justify calling such use "adverse" (*Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111; *Smith v. Denniff*, *supra*; *Featherman v. Hennessy*, *supra*), the impossibility of determining the quantity of water so used is perfectly manifest from what has already been said. There is nothing to show that from 1901 to 1904 the extent and character



of the use were in any wise different from what has been above detailed in subdivision 2 of this opinion as the condition at and prior to 1901; and this, coupled with the absence of anything to show a claim of right on the part of the person then making such use, must dispose of the matter of prescription.

Respondent's counsel present in their brief, as tending in some way to fortify the findings and decree, questions touching the [10] right of the city to take all the waters of Beaver creek from their watershed, and, pending their use for municipal purposes, to lease them to the intervener. The right of the city, as against inferior claimants, to take these waters from their watershed, is settled. (*Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 Pac. 727, 97 Pac. 838; *Carlson v. City of Helena*, 43 Mont. 1, 114 Pac. 110; *Lokowich v. City of Helena*, 46 Mont. 575, 129 Pac. 1063.) The respondent asserts no right save that considered above. Having failed, up to this time, to establish that right, we cannot assume that it has any, and, if it has none, it is in no position to question the lease.

The judgment and order appealed from are reversed and the cause is remanded for new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

Rehearing denied April 20, 1916.

STATE EX REL. METCALF, RELATOR, v. DISTRICT COURT  
ET AL., RESPONDENTS.

(No. 3,789.)

(Submitted January 10, 1916. Decided February 9, 1916.)

[155 Pac. 278.]

*Certiorari—Contempt of Court—Newspapers—Freedom of Press  
—Libelous Publication—Court Proceedings.*

Contempt of Court—Power to Punish.

1. The power to punish for contempt is inherent in courts of record, and a necessary incident to the exercise of judicial functions.

Same—Statutory Provisions not Exclusive.

2. The enumeration of certain acts as contempts in Section 7309, Revised Codes, is not exclusive.

Same—Newspapers—Libelous Publication—Freedom of Press.

3. *Held*, on *certiorari*, that publication of an article in a newspaper in effect charging a district judge with wrongdoing in connection with his decision in a cause disposed of by him six months before, did not constitute contempt of court, under Section 8275, Revised Codes, but fell within the constitutional provision guaranteeing the liberty of the press, for a violation of which privilege the law provides redress for libel by civil, or punishment by criminal, action.

[As to inherent power of court to punish for contempt in the case of newspaper publications, see note in 50 Am. St. Rep. 573.]

Original application for writ of *certiorari* by the State, on the relation of George L. Metcalf, against the District Court of the Fourth Judicial District of the State in and for Ravalli County, and R. Lee McCulloch, the judge thereof, to review proceedings resulting in a judgment adjudging relator guilty of contempt of court. Judgment annulled.

*Messrs. Johnson & Tucker* and *Mr. Park Smith*, for Relator, submitted a brief; *Mr. L. O. Johnson* argued the cause orally.

The weight of authority and the trend of modern decisions sustains the position that since the cases in question were not pending, the relator had the right to make such comments and reasonable criticism of the court and its rulings as he deemed fit. (*State ex rel. Ashbaugh v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep.

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As to effect of personal criticism of or insult to court because of decision after determination of cause, see note in 17 L. B. A. (n. s.) 585.

90, 38 L. R. A. 554, 72 N. W. 193; *Percival v. State*, 45 Neb. 741, 50 Am. St. Rep. 568, 64 N. W. 221; *Rosewater v. State*, 47 Neb. 630, 66 N. W. 640; *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415; *State v. Edwards*, 15 S. D. 383, 89 N. W. 1011; *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747; *In re Dalton*, 46 Kan. 253, 26 Pac. 673; *In re Thompson*, 46 Kan. 254, 26 Pac. 674; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199, 11 N. E. 426; *Cooper v. People*, 13 Colo. 337, 373, 376, 6 L. R. A. 430, 443, 22 Pac. 790, 802; *Field v. Thornell*, 106 Iowa, 7, 68 Am. St. Rep. 281, 75 N. W. 685; *State v. Bee Pub. Co.*, 60 Neb. 282, 83 Am. St. Rep. 531, 50 L. R. A. 195, 83 N. W. 204; *Ex parte McLeod*, 120 Fed. 130; *Dunham v. State*, 6 Iowa, 245; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *State v. Anderson*, 40 Iowa, 207; *Ex parte Green*, 46 Tex. Cr. 576, 108 Am. St. Rep. 1035, 66 L. R. A. 727, 81 S. W. 723; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *State Board of Law Examiners v. Hart*, 104 Minn. 88, 15 Ann. Cas. 197, 17 L. R. A. (n. s.) 585, 116 N. W. 212.)

*Mr. W. H. Poorman*, Assistant Attorney General, for Respondents, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In May, 1915, George L. Metcalf instituted proceedings in the district court to oust C. W. Ward from his office as county commissioner of Ravalli county. A demurrer to his complaint was sustained, and a judgment of dismissal entered. A like proceeding against N. J. Tillman was disposed of in like manner. In November following Metcalf caused to be published in the "Western News," a newspaper of general circulation in Ravalli county, a tirade of vilification and abuse directed at the county commissioners, the county attorney, and Honorable R. Lee McCulloch, the judge who presided in the Ward and Tillman cases. The publication is altogether too lengthy to be reproduced. In effect it charged the county commissioners with looting the pub-

lie treasury, and was apparently intended to charge Judge McCulloch with being in league with them, or at least quiescent or insensible to their wrongdoing. Metcalf was attached for contempt, tried, found guilty, and a fine imposed. At his instance a writ of *certiorari* was issued from this court, and the contempt proceedings are before us for review.

The causes to which the publication referred had been finally determined some time before the article was published; but the references to Judge McCulloch were not merely personal to him but related to his character as judge of the district court. One reference follows: "My first case was thrown out of court on a technicality, and again I brought suit. The judge threw it out of court, characterizing it as 'a dirty mess.' If a man takes a horse or a few head of cattle that do not belong to him, he goes to Deer Lodge [penitentiary]; but when two of our commissioners take \$683.90 of the county's money, that is simply 'a dirty mess.' "

The right to punish for contempt is as old as the law itself. [1] It is a power inherent in the courts of record of this state, is a part of their very life, and a necessary incident to the exercise of judicial functions. (*Territory v. Murray*, 7 Mont. 251, 15 Pac. 145; *In re Mettler*, 50 Mont. 299, 146 Pac. 747; *State ex rel. Boston & Mont. etc. Min. Co. v. Clancy*, 30 Mont. 193, 76 Pac. 10.) The legislature of this state has never undertaken to abridge the powers of the courts created by the Constitution to punish any act which would constitute contempt at common [2] law. In section 7309, Revised Codes, certain acts are denounced as contempts, but that the enumeration was not intended to be exclusive is manifest, for in section 8275 other acts are referred to as constituting contempts, which are not mentioned in section 7309.

The publication of a false or grossly inaccurate report of the [3] proceedings of a court constituted contempt at common law (4 Blackstone, 285), and section 3552, Revised Codes, declares: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United

States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state." The qualifications in this section, however, are of equal moment with the principal text. Many of the rules of the common law, however admirably adopted to monarchical England during the seventeenth or eighteenth century, are altogether out of harmony with the spirit of our democratic institutions and inapplicable to present-day conditions; and this is particularly true of the law of contempt. After enumerating seven classes of acts, any one of which constitutes contempt, Blackstone then adds a general saving clause, in which he includes as a contempt: "Anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people." (4 Blackstone, 285.)

In *Roach v. Garvan* (*St. James Evening Post Case*), 2 Atk. 469 (26 Eng. Reprint, Chap. 683), Lord Hardwicke said: "There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard."

There is not any doubt that the publication of scandalous matter concerning a court constituted contempt at common law, irrespective of whether the publication related to a case pending; but, unless it did relate to a cause before the court, it was treated as contempt only because it tended to bring the court into disrespect, or, in other words, to scandalize the court. The rule has been adopted and applied in a few instances in this country. (*Commonwealth v. Dandridge*, 2 Va. Cas. 408; *Burdett v. Commonwealth*, 103 Va. 838, 106 Am. St. Rep. 916, 68 L. R. A. 251, 48 S. E. 878; *State v. Morrill*, 16 Ark. 384; *State v. Hildreth*, 82 Vt. 382, 137 Am. St. Rep. 1022, 18 Ann. Cas. 661, 24 L. R. A. (n. s.) 551, 74 Atl. 71; *In re Moore*, 63 N. C. 397.)

Although the question was not presented, the supreme court of Michigan and the supreme court of Missouri each announced by *obiter dictum* its adherence to the same rule. (*In re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Crow v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79.) So far as our investigation goes, these are the only American decisions which assume to follow the common law to the extent of holding a libelous publication concerning a court or judge contempt of court irrespective of whether the publication referred to proceedings pending in court; and in each instance justification for the conclusion is found in the rule announced by Lord Hardwicke, that matters which tend to scandalize the court will constitute contempt.

In *Ex parte McLeod*, 120 Fed. 130, the United States district court for the district of Alabama treated as contempt an assault upon a United States commissioner because of his official act, although the assault did not occur in the presence of the court, or in any manner interfere with court proceedings. This case is *sui generis*.

In *State ex rel. Haskell v. Faulds*, 17 Mont. 140, 42 Pac. 285, this court had before it a publication concerning cases then pending in court, and determined that the publisher was guilty of contempt. The court declined to consider whether the same publication concerning cases finally determined would or would not constitute contempt, but for some reason not apparent quoted at considerable length from *State v. Morrill*, above.

The common law of England is not our birthright. To whatever extent it has been in force, it was and is ours by adoption and not by inheritance. The territory embraced within this state was not a British possession in colonial days, and came under the influence of the common law only by virtue of an Act of the first legislative assembly which provided: "That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative author-

ity." (Bannack Statutes, p. 356.) That statute remained in force throughout the territorial *régime* (sec. 201, 5th Div. Comp. Stats. 1887), was modified by the Constitution, and projected upon the state by section 1, Article XX, restated, but not materially changed, in section 5152, Political Code, and section 3552, Revised Codes, and in that form is a part of the law to-day. It is doubtful whether the law of contempt as understood in England at the time of the Revolution was ever in full force and effect in any American state, and certainly it was not in Montana, for long before the organization of the territory it had been greatly modified by the Fox Libel Act, by other Acts of parliament, by decisions of the courts, and by disuse.

It is worthy of note that, while some of our courts have recently adhered to the rule announced by the high court of chancery in 1742, in England, where it had its origin, it has long since fallen into a state of innocuous desuetude. In 1899, in *McLeod v. St. Aubyn*, 68 L. J. R. 137, the Judicial Committee of the Privy Council, after referring to the law of contempt as stated by Lord Hardwicke, said: "Committals for contempt of court by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them." There is nothing in *Rex v. Gray*, 2 Q. B. 36, 69 L. J. R. (n. s.) 502, to indicate a contrary view.

The history of the legislation regulating the power to punish for contempt in the federal courts, other than the supreme court, is indicative of the trend of public opinion upon this subject. In 1826 James H. Peck, United States district judge for the district of Missouri, imposed severe punishment upon Luke Lawless, an attorney, for publishing an article criticising one of his decisions. When the matter was called to the attention of the House of Representatives, Judge Peck was impeached, but, upon trial before the Senate, he was acquitted. The Congress, however, immediately enacted what is now section 725, United States Revised Statutes, which attaches the following

proviso to the authority granted federal courts to punish for contempt: "Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." And the power was further curtailed by the Clayton Act (Act Oct. 15, 1914, Chap. 323, 38 Stat. 730, Fed. Stats. Ann. 1915, Pamphlet Supp., p. 118).

The supreme court of North Carolina has recently receded from the position taken in the *Moore Case* above. While challenging the authority of the legislature to destroy or sensibly impair the power of a court to punish for contempt, the court treated a recent statute of that state upon the subject of contempt as follows: "Having reference to the history of this statute, the context, and the language employed, it was clearly the purpose and meaning of the Act to restrict the power of the court, in this last respect, to the publication of grossly inaccurate reports about a trial or other matter *still pending*, and, this being in our view the proper and only permissible occasion for the exercise of such a power in reference to these publications, we are of opinion that the provision of the statute should, in this respect, be upheld as written, and the power to punish summarily for defamatory reports and criticisms, about a matter that is past and ended, no longer exists." (*In re Brown*, 168 N. C. 417, 84 S. E. 690.)

In 6 Ruling Case Law, 512, the modern American doctrine is tersely stated as follows: "At common law the mere writing contemptuously of the judge of a superior court was a constructive contempt, but this doctrine has not been fully adopted in this country and has been limited by our constitutional guarantees of free speech and liberty of the press to pending cases. The common-law rule was founded on the obsequious and flatter-



ing principle that a judge was the representative of the king, but the theory of government which invests royalty with an imaginary perfection, and which forbids question or discussion, is diametrically opposed to the principles of a free and popular government, in which the utmost latitude and liberty in the discussion of business affecting the public and the conduct of those who fill positions of public trust, that is consistent with truth and decency, is not only allowable, but is essential to the public welfare." And the text is amply sustained by the authorities. (9 Cyc. 20; Rapalje on Contempt, sec. 56; 7 Ency. Law, 2d ed., 61; 2 Cooley on Torts, p. 820; 2 Bishop on Criminal Law, sec. 259; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199, 11 N. E. 426; *State v. Kaiser*, 20 Or. 50, 8 L. R. A. 584, 23 Pac. 964; *State v. Tugwell*, 19 Wash. 238, 43 L. R. A. 717, 52 Pac. 1056; *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747; *Cooper v. People*, 13 Colo. 337, 373, 6 L. R. A. 430, 22 Pac. 790; *State v. Bee Pub. Co.*, 60 Neb. 282, 83 Am. St. Rep. 531, 50 L. R. A. 195, 83 N. W. 204; *State Board of Law Examiners v. Hart*, 104 Minn. 88, 15 Ann. Cas. 197, 17 L. R. A. (n. s.) 585, 116 N. W. 212; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *Field v. Thornell*, 106 Iowa, 7, 68 Am. St. Rep. 281, 75 N. W. 685; *Ex parte Green*, 46 Tex. Cr. 576, 108 Am. St. Rep. 1035, 66 L. R. A. 727, 81 S. W. 723; *State ex rel. Ashbaugh v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep. 90, 38 L. R. A. 554, 72 N. W. 193; *In re Cooke*, 116 La. 723, 41 South. 49; *In re Brown*, above.)

The framers of our Constitution recognized, without limiting, the power of the courts to punish for contempt (sec. 3, Art. VIII); but they understood the law of contempt to be a law of necessity, and its exercise in any given instance to be measured and restricted by the necessity which calls it into existence. The purpose to be subserved by investing our courts with such extraordinary power is to enable them to maintain order and decorum, compel respect for their lawful orders and process, and enable them to investigate and determine the causes before them without let or hindrance from any extraneous sources. Any publication which tends to interrupt the due course of

judicial administration deserves rebuke. But our Constitution provides: "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." (Constitution, sec. 10, Art. III.)

It cannot be that liberty of the press means only the right to publish laudatory matter concerning a court or judge, but that as to their shortcomings or demerits there must be profound silence. In the language of a distinguished jurist: "No such divinity doth hedge about a judge."

The publication of a false, or grossly inaccurate, report of the proceedings of a court, constitutes contempt of court, and subjects the offender to prosecution in a criminal action for a misdemeanor. (Rev. Codes, sec. 8275.) Standing alone, the language might be deemed sufficiently comprehensive to include comments upon cases finally determined; but it is to be remembered that the provision first found its way into the statutes of this state in 1895, and therefore is to be construed in the light of our constitutional guaranties, the decisions of courts generally, and the fact that the section does not undertake to define contempts but only to designate certain contempts as crimes. The most cogent reason exists for restraining a false publication concerning matters pending in court, where the administration of the law may be impeded or justice actually defeated, and the interests of the public are sufficiently involved to warrant classifying such a contempt as a crime. But we cannot believe that the legislature ever intended to denounce as a crime every false or grossly inaccurate report concerning causes finally determined, when no public interest can suffer as a consequence of the publication.

If it be contempt of court and a crime to publish a false report concerning a cause finally decided a week or a month ago, the offense is equally as great if the false report concerned the proceedings taken in the most trivial cause a year ago. To say that the plaintiff was successful in the case of *A. v. B.*, when in fact the defendant prevailed, would be a false report of the pro-

ceedings in that case; but no one would venture to suggest that the publisher of such report is guilty of contempt of court and of a misdemeanor.

The publication by this relator is hardly susceptible of classification as a report of court proceedings. If it offends, it is because it libels the judge and scandalizes the court; but the offense of "scandalizing the court," as understood at common law, is unknown to our jurisprudence, particularly since the adoption of the Constitution, and ample provision is made for redress for libel, by civil action. The supreme court of Kansas has said: "No judge, and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust." (*In re Pryor*, above.)

And the supreme court of the United States declared: "When a case is finished, courts are subject to the same criticism as other people." (*Patterson v. Colorado*, 205 U. S. 454, 463, 10 Ann. Cas. 689, 51 L. Ed. 879, 27 Sup. Ct. Rep. 556.)

A court, as such, has no sentient existence. It is only through its administrators that it can be assailed, and every attack necessarily has its personal as well as its official phase. So long as published criticism does not impede the due administration of the law, it were better that we maintain the guaranty of our Constitution than undertake to compel respect or punish libel by the summary process of attachment for contempt. In *Field v. Thornell*, above, the supreme court of Iowa said: "It must be added, however, that the courts have no power or desire to control the press in its legitimate sphere. Its freedom is jealously guarded by the law, and made secure in the Constitution. It enjoys the utmost latitude in reviewing the action of the courts, and may, after the particular litigation is ended, assail,

with just criticism, opinion, rulings, and judgments with the weapons of reason, ridicule or sarcasm."

The power to punish for contempt is in its nature a trust reposed in the courts, not for themselves, but for the people whose laws they interpret and whose authority they exercise. (*Watson v. Williams*, 36 Miss. 331.) While a court which would hesitate to use the power when the circumstances warrant would be guilty of craven faithlessness to duty, it is always to be kept in mind that such power is imperious in its nature and summary in its execution. Under the law as it has been modified to harmonize with the genius of our institutions, the very judge who is libeled may become complainant, prosecutor, witness and judge. It countenances arrest without warrant, trial without jury, and punishment without the right of appeal. It is the nearest approach to autocratic power of any permitted under our form of government, and is not to be extended by implication. To confine its operations within the limits we have indicated will not impair the usefulness of the courts. Libel may still be prosecuted criminally or by civil action. "Respect to courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue, and intelligence, and whilst they are found upon the judgment seat, so long, and no longer, will they retain the public confidence. If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country; and if he has received an injury, ample remuneration will be made." (*Stuart v. People*, 3 Scam. (4 Ill.) 395.)

The affidavit does not state facts sufficient to constitute contempt of court, and the judgment of the district court is annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## STATE EX REL. BRANDEGEE, RELATOR, v. CLEMENTS, DISTRICT JUDGE, RESPONDENT.

(No. 3,795.)

(Submitted January 17, 1916. Decided February 10, 1916.)

[155 Pac. 271.]

*Habeas Corpus — District Judges — Disqualification — Imputed Bias and Prejudice—Prohibition.**Habeas Corpus—Disqualification of District Judge—Imputed Bias and Prejudice.*

1. *Habeas corpus* seeking the release of an incompetent from the custody of her guardian on the ground that she was competent and illegally restrained of her liberty, is a proceeding civil in its nature; hence, the guardian had the right to disqualify the judge who issued the writ, for imputed bias and prejudice, under amended Section 6315, Revised Codes (Chap. 161, Laws 1909).

*Same—Impairing Efficacy of Writ.*

2. Inasmuch as the writ of *habeas corpus* is a highly prerogative one and the disposition of the proceeding is not directly subject to review, the conclusion that the right to disqualify the district judge for imputed bias and prejudice may be exercised in such a proceeding, does not impair, but rather increases, the efficacy of the writ.

*Prohibition—When Issuance of Writ not Premature.*

3. Where the allegations of relator's affidavit that an affidavit of disqualification for imputed bias and prejudice had been filed in time, that the district judge paid no attention to it and intended to hear and dispose of a *habeas corpus* proceeding the day after the issuance of the writ, were admitted by a motion to quash, the issuance of a writ of prohibition was not premature.

[As to disqualification of judge for interest, see note in Ann. Cas. 1912C, 1165.]

Original application by the State, on the relation of E. N. Brandege, guardian of Mary Murphy, an incompetent, for a writ of prohibition against J. M. Clements, Judge of the District Court of Lewis and Clark County. Writ issued.

*Messrs. Galen & Mettler* and *Mr. Edward D. Phelan*, for Relator, submitted a brief; *Mr. F. W. Mettler* argued the cause orally.

*Mr. Wellington D. Rankin*, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The relator, E. N. Brandegge, shows to this court: That he is, and since August, 1915, has been, the duly appointed and acting guardian of the person and estate of Mary Murphy, judicially declared incompetent; that on January 10, 1916, Anna E. Nett, daughter of said Mary Murphy, filed in the district court of Lewis and Clark county a petition, alleging, in substance, that said Mary Murphy is illegally imprisoned and restrained of her liberty by the relator, under the pretense that she is incompetent to take care of herself and of her property, whereas she is now competent and capable of taking care of herself and her property, and praying the issuance of a writ of *habeas corpus*, to the end that she be released from such restraint; that on the same day such writ was ordered to issue by Honorable J. M. Clements, one of the judges of said court, and was issued returnable January 11, 1916, at 2 o'clock P. M.; that the writ was served the day of its issuance, and the relator thereupon filed in said court his affidavit imputing bias and prejudice to Judge Clements, under the provisions of section 6315, Revised Codes, as amended; that Judge Clements has failed to call in another judge to hear said matter, but threatens to, and, unless prevented by this court, will, proceed to hear the same himself, without jurisdiction so to do, and to the prejudice of relator and his ward.

Upon the filing of this petition an alternative writ of prohibition was issued, which respondent has moved to quash, for that the petition herein does not state facts sufficient to justify any interference by this court, is premature, and is an impairment of the efficiency of the writ of *habeas corpus*. Upon this state of the record the matter was heard and submitted; the principal [1] question presented being whether the privilege granted by subdivision 4, section 6315, Revised Codes, as amended, is available in *habeas corpus* proceedings. The respondent says it is not, arguing that *habeas corpus* is a special proceeding of a criminal nature, and to such proceedings, according to the decision of this court in *State ex rel. Boston & Mont. etc. Min.*

*Co. v. The Judges*, 30 Mont. 193, 76 Pac. 10, the provisions in question do not apply.

The notion that *habeas corpus* is a special proceeding of criminal nature is based upon the fact that the statutory provisions relating to it are found in the Penal Code, in a title headed "Special Proceedings of a Criminal Nature" (Rev. Codes, secs. 9630 *et seq.*), and upon some expressions found in *State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589, and *State ex rel. Hepner v. District Court*, 40 Mont. 17, 104 Pac. 872. These circumstances are to be considered, but they are not to be given weight beyond their due. The provisions for the writ of *habeas corpus* were not enacted, in the first instance, as part of our present Codes or of the Codes of 1895, but antedate them, and the inclusion of them in the Penal Code under the title heading "Special Proceedings of a Criminal Nature" was primarily the codifiers' solution of a question which has always been vexatious in Code making, *viz.*, the question of classification. The legislature, recognizing this, especially enacted in subdivision 3, section 3562, that the classification of the several parts of the four Codes is to be regarded as made for convenience and orderly arrangement only, and no implication or presumption of legislative construction is to be drawn therefrom. So that, whatever persuasive force may be given to collocation in determining the scope and meaning of particular statutes, the essential nature of a remedy recognized or conferred is not to be settled by considerations of this character alone. The expressions relied on from *State ex rel. Jackson v. Kennie* are neither definite nor decisional; while *State ex rel. Hepner v. District Court* simply holds that the statute does not provide for the disqualification of a judge by the state in a *habeas corpus* proceeding—an indisputable proposition, grounded, however, in the obvious fact that the state is not a party to such proceeding, rather than in any notion that the proceeding is criminal in its nature. The matter, however, is not *res integra* in this state. All the statutory provisions we now have which can in any wise characterize the proceeding as

civil or criminal, existed in 1893 (Comp. Stats. 1887, sec. 1164 *et seq.*), and under them it was held in *State ex rel. Newell v. Newell*, 13 Mont. 302, 34 Pac. 28, that *habeas corpus* is a special proceeding in the nature of an action so far civil that the petitioner is a plaintiff and the disposition of the matter a judgment within the meaning of section 495 of the Code of Civil Procedure, Compiled Statutes of 1887, allowing costs to the plaintiff upon a judgment in his favor in special proceedings in the nature of an action. And this is entirely in harmony with the rule announced by the overwhelming weight of authority (see note to *Fisher v. Baker*, 7 Ann. Cas. 1018 [203 U. S. 174, 51 L. Ed. 142, 27 Sup.-Ct. Rep. 135]), the reasons for which are thus stated by Chief Justice Waite: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims as against those who are holding him in custody, under the criminal process. \* \* \* The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. \* \* \* Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution." (*Ex parte Tom Tong*, 108 U. S. 556, 27 L. Ed. 826, 2 Sup. Ct. Rep. 871; see, also, *Winnovich v. Emery*, 33 Utah, 345, 93 Pac. 988; *State v. Huegin*, 110 Wis. 189, 224, 62 L. R. A. 700, 85 N. W. 1046; *People v. Dewey*, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013;



*Simmons v. Georgia Iron etc. Co.*, 117 Ga. 305, 61 L. R. A. 739, 43 S. E. 780.) From this, indeed, there is but qualified dissent; a few cases going so far as to hold that, where the writ is sought to secure release from custody exercised in virtue of the criminal laws, it may then be classed as criminal (*Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Gleason v. Commissioners of McPherson County*, 30 Kan. 53, 492, 1 Pac. 384, 2 Pac. 644; *People v. Bradley*, 60 Ill. 390); but no decision has been called to our attention in which it is even suggested that the proceeding can be criminal in its nature when invoked on any other occasion. In any recognized view of the matter, therefore, the proceeding here presented must be regarded as civil in its nature, the parties thereto being Mrs. Murphy and her guardian, both of whom are entitled to the privileges conferred by section 6315, Revised Codes, *supra*.

It is suggested by the respondent that this conclusion tends [2] to impair the efficiency of the writ of *habeas corpus*. We think the contrary is true. The writ is a high prerogative one, the disposition of the proceeding is not directly subject to review, and the greater necessity therefore exists for the hearing of it by a judge whose impartiality cannot be questioned. Moreover, the writ in the present instance is merely used to have determined the question of Mrs. Murphy's present competency. The proper proceeding for that purpose is prescribed in section 7767 of the Revised Codes, and in such proceeding either party may disqualify for imputed bias. (*State ex rel. Carroll v. District Court*, 50 Mont. 506, 148 Pac. 312.) We have not decided, and do not now decide, that the writ of *habeas corpus* is an alternative method to accomplish the same end. But, assuming that it is, the mere selection of one form of procedure instead of the other, at the arbitrary will of one of the parties, affords no reason for depriving the other party of a right to which he would otherwise be entitled.

The suggestion that the proceeding in this court is premature [3] is without merit. The petition alleges, in effect, that the affidavit of disqualification was filed in time; that Judge Clem-

ents has paid no attention to it; that he intends to hear and dispose of the matter himself. These things are admitted by the motion to quash; so that the relator is subjected to a proceeding before Judge Clements, wherein Judge Clements has no jurisdiction save to set it for trial, transfer it, or call another judge (*State ex rel. Goodman v. District Court*, 46 Mont. 492, 128 Pac. 913; *State ex rel. Sherman v. District Court*, 51 Mont. 220, 152 Pac. 32), and wherein the disposition of it, if adverse to the relator, cannot be reviewed in the ordinary course of law.

It is therefore ordered that a peremptory writ issue prohibiting the respondent from proceeding further in the matter referred to, save to transfer it or set it for hearing and call another judge to hear the same.

*Writ Issued.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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STATE EX REL. LINDSEY, RELATOR, v. AYERS, DISTRICT  
JUDGE, RESPONDENT.

(No. 3,799.)

(Submitted January 27, 1916. Decided February 11, 1916.)

[155 Pac. 276.]

*Mandamus—Bill of Exceptions—Settlement—Duty of District Judge.*

*Mandamus—Jurisdiction of Supreme Court.*

1. After the institution of proceedings in *mandamus* to compel a district court to restore a bill of exceptions stricken from the files and a settlement thereof, the supreme court cannot be ousted of jurisdiction by an order rescinding the order striking the bill and making one refusing settlement for reasons which must have existed when the order complained of was made.

*Same—Bill of Exceptions—Settlement.*

2. Where a party pursues the statute in the preparation, service and presentation of his proposed bill of exceptions, he is entitled to have it settled as a matter of right, and settlement may be compelled by *mandamus*.

**Bill of Exceptions—Settlement—Duty of District Judge.**

3. Since "settlement" of a bill of exceptions, as required by Section 6788, Revised Codes, means the elimination of all unnecessary matter and the incorporation of all matter necessary to present the exceptions, the judge to whom a bill is presented cannot refuse to settle it merely because it does not contain all the proceedings or the evidence and contains misstatements of facts, but in such case he must require the bill to state the truth and fairly exhibit the exceptions saved, strike out useless matter, and then sign the bill with his certificate as required by the statute.

[As to *mandamus* against judicial officers, see note in 92 Am. St. Rep. 890.]

Original application for writ of mandate by the State, on the relation of Theodore Lindsey, against Roy E. Ayers, Judge of the District Court of the Tenth Judicial District in and for the County of Fergus, to compel restoration to the files of a bill of exceptions and settle the same. Peremptory writ issued.

*Mr. P. B. Berger*, for Relator.

*Messrs. Belden & De Kalb*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In an action entitled *First National Bank of Miles City v. Theo. Lindsey*, tried in the district court of Fergus county, resulting in a verdict and judgment for plaintiff, the defendant gave notice of his intention to move for a new trial upon a bill of exceptions thereafter to be prepared. A draft of the proposed bill was served and delivered to the judge for settlement. At the instance of the plaintiff, the proposed bill was stricken from the files and settlement refused November 29, 1915. To the application of the moving party for an alternative writ of mandate, the respondent judge has made return that the order striking the bill has been rescinded and the bill restored to the files, and that he has refused to settle it because it does not contain all the proceedings or all the evidence or the substance of it, and contains a misstatement of facts. These reasons will be treated as additional grounds for the order refusing settlement on November 29, 1915. We do not concede that the court

[1] or judge, by revoking the order of November 25, after this proceeding was instituted, and making another order refusing settlement for reasons which existed, if at all, when the first order was made, can oust this court of jurisdiction to determine whether this relator is entitled to have his proposed bill settled.

So far as the record discloses, the relator pursued the statute in the preparation, service and presentation of his proposed bill, and therefore is entitled to have it settled as a matter of right, and settlement may be compelled by *mandamus*. (*Montana Ore Pur. Co. v. Lindsay*, 25 Mont. 24, 63 Pac. 715.)

An attorney who intentionally presents a false or unfair statement of the court proceedings for settlement as a bill of exceptions merits discipline; but attorneys even are fallible, and of this fact the legislature took notice in providing for amendments (sec. 6788, Rev. Codes), which would be altogether unnecessary if the moving party's draft must be absolutely correct in the first instance.

Generally, the bill should not contain all the evidence taken upon the trial. Section 6788 commands "the judge or referee [3] in settling the bill, to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible." But even if the moving party is derelict, it affords no excuse for the failure of the judge to perform his duty. If the draft as proposed contains matters which it should not, it is the duty of the judge to strike them out. If it fails to contain matters which should be included, it is the duty of the judge to have them incorporated. In other words, instead of refusing to settle a defective bill, the judge should require it to be made to state the truth and fairly exhibit the exceptions saved. The legal distinction between settling and signing a bill of exceptions has been adverted to frequently. (*Montana L. & P. Co. v. Howard*, 10 Mont. 296, 25 Pac. 1024.) By "settlement" is meant the elimination of all unnecessary matter and the incorporation of all matter necessary to present the exceptions as briefly as possible.

The peremptory writ will issue requiring this respondent to settle the bill of exceptions presented by the defendant in the case of *First National Bank of Miles City v. Theo. Lindsey*, and, when settled, to sign the same with his certificate as required by section 6788 above.

*Writ Issued.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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HILLS, APPELLANT, v. JOHNSON, RESPONDENT.

(No. 3,594.)

(Submitted February 9, 1916. Decided February 21, 1916.)

[156 Pac. 122.]

*Contracts—Rescission—Acceptance of Benefits—Estoppel.*

1. One who bought what at the time he deemed a right to make immediate homestead entry of public land, but which subsequently proved to be no more than a possessory right on unsurveyed land, and with such knowledge entered the land as a homestead when declared open to settlement, made two partial payments under his agreement, and then, after expiration of two years, brought an action to rescind and recover back his payments, was, under Section 5065, Revised Codes, not entitled to prevail.

[As to effect of failure to read contract, or carelessness in executing it on right to rescind, see note in 32 Am. St. Rep. 384.]

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by B. F. Hills against Harry H. Johnson. Judgment for defendant and plaintiff appeals. Reversed and remanded, with direction to enter judgment for plaintiff.

Cause submitted on briefs of counsel.

*Mr. Oscar O. Mueller and Mr. Anton D. Strouf, for Appellant.*

*Mr. Chas. J. Marshall, for Respondent.*

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff to recover of the defendant the sum of \$469.91, with interest from September 14, 1912, alleged to be a balance due upon a promissory note for \$700 executed by the defendant to plaintiff on August 30, 1910, payable within two years thereafter. Defendant admitting the execution of the note, alleges as a defense and counterclaim substantially the following: That on or about August 30, 1910, the plaintiff represented to defendant that he had for sale a relinquishment of a homestead entry by one Alice Nelson upon a quarter section of public land of the United States in Fergus county, which he agreed to sell to the defendant for \$1,200; that defendant, relying upon the representations thus made by plaintiff, agreed to pay him for the relinquishment this sum; that the plaintiff and the defendant went to the office of one Leon S. Thurston, United States Commissioner at Stanford in Fergus county, and had certain papers executed which plaintiff represented to defendant to be a relinquishment by Alice Nelson and a homestead filing by the defendant upon the said land; that he thereupon executed and delivered to plaintiff two promissory notes, one for \$500 due and payable on or before September 30, 1910, and a second for \$700, the one upon which this action was brought; that according to the terms of the agreement the plaintiff paid the full amount of the first note and made two payments on the second, *viz.*, \$233.78 on December 1, 1911, and \$100 on September 14, 1912; that the representations so made by the plaintiff were false; that the notes were without consideration because the land was at the time unsurveyed public land not subject to homestead entry under the laws of the United States, and so remained for a long time thereafter, all of which plaintiff knew but the defendant did not know; that all the payments to plaintiff were made before defendant learned that plaintiff's representations were false; that plaintiff did not in fact have a relinquishment from Alice Nelson; and that by these false and fraudulent representations whereby defend-

ant was induced to enter into the agreement and make the payments referred to, defendant suffered damage in the amount so paid. Judgment is demanded that the note be canceled, and that defendant be awarded the sum of \$839.43, the amount of the payments made by him. A trial upon the issues made by defendant's reply to these allegations resulted in a verdict for the defendant. Plaintiff has appealed from the judgment.

The relief sought by the defendant is in effect a rescission of the agreement under section 5065 of the Revised Codes. It is insisted by counsel that the court erred in refusing to direct a verdict for plaintiff, on the ground that the defendant does not allege in his answer, nor does the evidence disclose, that he restored or offered to restore to the plaintiff everything of value received from him under the agreement. We shall not stop to consider the sufficiency of the pleading. Assuming that it alleges sufficient to warrant relief, in our opinion the evidence wholly fails to make a case under the statute. When not effected by consent, rescission may be accomplished by observance by the party seeking it, of these requirements: "(1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and (2) he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." (Section 5065, *supra*.)

There is a conflict in the evidence as to whether the subject of the negotiations resulting in the agreement was understood [1] to be a relinquishment of a homestead filing by Alice Nelson or a mere possessory right upon unsurveyed public land owned by the plaintiff himself, by purchase from one Jensen. These facts are established beyond controversy: When he met plaintiff, the defendant was in search of vacant public land which he might acquire as a homestead under the laws of the United States. The plaintiff had theretofore purchased from

Jensen the right to the possession of 320 acres with the improvements thereon. He agreed to transfer to the defendant 160 acres with certain improvements for \$1,200. Thereupon he and the defendant went to Thurston, United States Commissioner at Stanford, to have the transfer made. Upon inquiry of Thurston as to the best method of effecting the transfer, they were advised that this could be best done by defendant's filing with the clerk of the county "a declaration of intention" to occupy and cultivate the land. Such a declaration was drawn by Thurston and, being signed and verified by the defendant, was transmitted to the clerk. The notes were then executed and delivered. A second agreement was then drawn and executed, under the terms of which the defendant bound himself to cultivate at least 60 acres of the land, the cultivation to begin during the fall of 1910, and to permit the plaintiff to hold a one-half interest in the crop from year to year as security for the payment of the last note. The plaintiff was then in possession, but immediately surrendered possession to the defendant. The improvements consisted of a small house and a well about thirty feet deep, not yet completed. The land was surveyed in June, 1911, and was declared open to homestead filing in October, 1913. In the meantime the defendant retained possession of it, and when it was opened for homestead entry, made entry of it. Though he found out as early as June, 1911, that the land was not open to entry because it had not been surveyed, he did not then nor at any time thereafter until he filed his answer in this case on November 5, 1913, express any dissatisfaction with what he had acquired from plaintiff, or any intention to rescind the agreement. On the contrary, he made the two payments of December 1, 1911, and September 14, 1912. These facts bring the case within the decisions in *Turk v. Rudman*, 42 Mont. 1, 111 Pac. 739, and *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37, and preclude recovery. The defendant, with full knowledge of all the facts, elected to stand upon the agreement and retain the benefit he had received.



Let it be conceded that the improvements upon the land were of small value. By the transfer the defendant obtained the right to the immediate possession of the land, and thus a priority of right to make entry of it as a homestead. This was the purpose he sought to accomplish by his purchase. It was a right of substantial value; and though defendant agreed to pay an extravagant price for it, this is no reason why he should not keep his agreement. "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." (Rev. Codes, sec. 4995.)

As we have already said, the defendant after discovery of the fact that he had acquired merely a possessory right on unsurveyed land instead of a right to make immediate entry, elected to retain such right as he did acquire. He is therefore not entitled, under section 5065, *supra*, to have the agreement rescinded.

The judgment is reversed and the cause remanded, with directions to the district court to enter judgment for the plaintiff.

*Reversed and remanded.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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STATE EX REL. TAYLOR, RELATOR, v. DUNCAN, COUNTY  
CLERK, RESPONDENT.

(No. 3,809.)

(Submitted February 19, 1916. Decided February 23, 1916.)

[155 Pac. 1111.]

*Primary Elections—Time for Holding—Initiated Laws—Construction—Mandamus.*

1. Held, on *mandamus*, that initiated law providing for a primary election of candidates for delegates to national party conventions and for the nomination of presidential electors by direct vote (Laws 1913, p. 590), to be held on the forty-fifth day before the first Monday in June in presidential years, and the law, likewise initiated (Laws

1913, p. 570), making provision for a similar election for the purpose of making party nominations of state and county officers to be held on the seventieth day preceding the biennial general elections, may not be construed so as to permit the holding of but one election for both purposes.

Original application for writ of mandate by the State, on the relation of William Taylor, against A. J. Duncan, as County Clerk of Lewis and Clark County. Heard on motion to quash. Motion granted, and proceeding dismissed.

*Messrs. Galen & Mettler*, for Relator, submitted a brief; *Mr. A. J. Galen* argued the cause orally.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, submitted a brief; *Mr. Poorman* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

*Mandamus* to compel the respondent, as county clerk of Lewis and Clark county, to file the petition of the relator as a candidate for the Democratic nomination to the office of public administrator of said county and to place his name as such candidate upon the official ballot to be used at the primary election to be held on April 21, 1916. The theory upon which the relief is sought is that in virtue of the provisions of the laws passed by the initiative at the general election of 1912, relating to primary elections, it is required that, in the years when a President and Vice-president of the United States are to be elected, the primary election for all offices—state and county, as well to indicate the presidential preference, to nominate presidential electors, and to elect delegates to the national conventions—shall be held on the forty-fifth day before the first Monday of June. As no dispute exists concerning the relator's right to be submitted as such candidate for nomination at such time as may be appropriate, the question presented is whether these initiated laws contemplate the holding of one primary or two in presidential years.

That these laws are an attempt by the people to enact in this [1] state the general features of the primary law of Oregon cannot be open to doubt, and it must likewise be conceded that the effort to adapt the provisions of that law to the legislative and other conditions of this state has been most unskillfully performed. Some things, however, are obvious. At the time our laws were enacted, the Oregon law consisted of the general primary law relating to nominations for state and county offices as amended by a later enactment relating to presidential electors and delegates to national conventions; the whole, however, constituting one law, the effect of which is to require but one primary election in presidential years. Had it been the intention to so provide in this state, the Oregon law as a whole would doubtless have been enacted in one law. This was not done; instead, the people of this state enacted two laws, one establishing the primary for nominations to state and county offices, to be held on the seventieth day preceding the biennial general elections, the other providing for an election to be held on the forty-fifth day before the first Monday in June in presidential years, for the selection of delegates to national party conventions and for the nomination of presidential electors. It is quite true the latter Act contains the phrase, "the primary nominating election shall be held, *etc.*"; but it cannot be supposed that this phrase has reference to any other election than the one therein prescribed. The apparently deliberate separation of the single Oregon law into the two Montana Acts cannot be ignored.

Again, the title to the Act last referred to is significant. While we are not required to hold that a law passed by the people upon the initiative is subject in all respects to the constitutional provisions and restrictions touching the title to Acts passed by the legislative assembly, yet the title may be fairly accepted as a notice to the people of the general contents of a bill presented for their acceptance or rejection, and as some indication of their intent in passing it. Now, the title in question contains no intimation that state and county nominations are involved in the Act, but expressly avows that its purpose is "to

provide for the expression by the people of the state of their preference for party candidates for President and Vice-president of the United States, the election of delegates to presidential conventions and the nomination of presidential electors."

The relator invokes the rule which requires us to avoid a construction leading to absurdity or mischief, and asserts that the duplication of primaries is both of these. Whether this is so depends somewhat on the point of view, and we are not prepared to say that no sound reason whatever can be assigned for the separation of the two events. These considerations have to do, therefore, not with the construction or validity of the law relating to presidential primaries, but with its wisdom, and of that this court is not the arbiter. If, as appears here, it was the apparent intention of the people, for reasons satisfactory to themselves, to segregate the primary election for presidential preference from that for state and county offices, we know of no legal obstacle to the accomplishment of that intention. We see nothing in the provisions of the presidential primary law, either within itself or in collation with other statutory provisions, to warrant any other construction, and we are satisfied that the county clerk of Lewis and Clark county is under no legal duty to submit the relator's candidacy at the primary election in April.

The motion to quash is therefore sustained and the proceeding dismissed.

*Dismissed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

JOHNSON, RESPONDENT, v. CHICAGO, MILWAUKEE &  
ST. PAUL RY. CO., APPELLANT.

(No. 3,603.)

(Submitted February 10, 1916. Decided February 24, 1916.)

[155 Pac. 971.]

*Railroads—Killing of Livestock—Negligence—Presumptions—  
Conflict in Evidence—Directed Verdict—Proper Refusal.*

1. Where the presumption of negligence on the part of a railroad company in the killing of livestock by one of its trains relied on by plaintiff (Rev. Codes, sec. 4309) is confronted with testimony of its train operatives that there was not any negligence on their part, the result is a conflict of evidence resolvable by the jury; hence a directed verdict in favor of defendant was properly refused.

[As to a railroad company's duty to cattle on track, see note in 20 Am. St. Rep. 161.]

*Appeal from District Court, Missoula County; J. E. Patterson, Judge.*

ACTION by Margaret Johnson against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Affirmed.

*Mr. Henry C. Stiff*, for Appellant, submitted a brief, citing in support of appellant's contention: *Spaulding v. Chicago & N. W. Ry. Co.*, 33 Wis. 582; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Huber v. Chicago, M. & St. P. Ry. Co.*, 6 Dak. 392, 43 N. W. 819; *Volkman v. Chicago, St. P. etc. Ry. Co.*, 5 Dak. 69, 37 N. W. 731; *Crary v. Chicago, M. & St. P. Ry. Co.*, 18 S. D. 237, 100 N. W. 18; *Louisville & N. Ry. Co. v. Rountree*, 4 Ky. Law Rep. 447; *Keilbach v. Chicago, M. & St. P. Ry. Co.*, 11 S. D. 468, 78 N. W. 951; *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870.

*Messrs. J. H. Tolan* and *R. F. Gaines*, submitted a brief in behalf of Respondent; *Mr. Gaines* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On May 10, 1913, a milch cow belonging to the respondent was struck and killed by one of the appellant's trains, and the respondent brought this action to recover \$85, the value of said cow. The complaint alleges negligence in the killing, and while the answer amounts to a general denial, negligence was the only issue developed at the trial. As evidence of such negligence, [1] respondent relied upon the presumption established by section 4309, Revised Codes. This the appellant sought to rebut by the evidence of the engineer and fireman which, if accepted in all respects, tended to show that there was no negligence, and at the close of all the evidence moved a directed verdict, the denial of which constitutes the only error assigned.

Appellant's contention is that, having presented testimony tending to exonerate it from negligence, the presumption was overcome in the absence of a further showing by the respondent, and a verdict should have been directed accordingly. This is untenable. When a presumption of this character is confronted with testimony in the opposite direction, the result is a conflict of evidence which the jury must resolve. (Rev. Codes, sec. 8028, subd. 2; *Freeman v. Chicago, M. & St. P. Ry. Co.*, 52 Mont. 1, 154 Pac. 912; *Emerson v. Butte Electric Ry. Co.*, 46 Mont. 454, 129 Pac. 319.)

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

CITY OF BUTTE ET AL., APPELLANTS, v. INDUSTRIAL ACCIDENT BOARD ET AL., RESPONDENTS.

(No. 3,793.)

(Submitted February 9, 1916. Decided February 24, 1916.)

[156 Pac. 130.]

*Master and Servant—Cities and Towns—Workmen's Compensation Act—Statutory Construction—Rules.*

**Workmen's Compensation Act—Compulsory as to Cities.**

1. *Held*, that plan No. 3 provided by the Workmen's Compensation Act (Laws 1915, Chap. 96, p. 168) is, as to a city, exclusive, compulsory and obligatory upon both employer and employee.

**Statutory Construction—Rule.**

2. In the construction of statutes, every word thereof must be given some meaning if it is possible to do so.

**Same—Rule.**

3. Where one portion of a statute deals with the subject in hand in general terms, and another in a more minute and definite way, and the two are in apparent inconsistency with each other, they must be read together and harmonized, if possible.

[As to rule that words of a statute must be given their ordinary meaning, see note in 12 Am. St. Rep. 827.]

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

PROCEEDINGS by Hugh Smith, employee, for compensation under the Workmen's Compensation Act against the City of Butte, employer. The Industrial Accident Board rejected the claim, and on appeal to the District Court the order was affirmed, and the city appeals. Reversed and remanded.

Messrs. J. V. Dwyer, John A. Groeneveld and N. A. Rotering, for Appellants, submitted a brief; Mr. Groeneveld argued the cause orally.

Mr. J. B. Poindexter, Attorney General, and Mr. C. S. Wagner, Assistant Attorney General, for Respondents, submitted a brief; Mr. Wagner argued the cause orally.

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On Workmen's Compensation Acts generally, see extensive note in L. E. A. 1916A, 23.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Hugh Smith, an employee of the city of Butte, was injured in the course of his employment on July 6, 1915. He applied for compensation, but the Industrial Accident Board rejected his claim because at that time the city had not elected to be bound by the Workmen's Compensation Act. On appeal the order of the board was affirmed; the district court of Silver Bow [1] county holding that the Workmen's Compensation Law is elective as to the city of Butte. That decision is now before us for review.

The question for solution is not free from doubt or difficulty. Because of the loose language employed in the measure, and the failure to express the legislative intent in plain, terse English, any construction which may be put upon the Act leads to more or less absurd results. Speaking generally, the measure (Chapter 96, Laws 1915) is intended to provide compensation to workmen who are injured, or to dependents of workmen killed, in hazardous undertakings. It provides three plans for securing and making payment. The Act is intended to cover all hazardous employments except certain special classes which are excepted and which need not be considered here. By section 6(i) a public corporation, such as a city, is declared to be an employer within the meaning of the Act. Sections 3(f) and 3(i) read:

"Sec. 3(f). Every employer engaged in the industries, works, occupations, or employments in this Act specified as 'hazardous' may \* \* \* elect whether he will be bound by either of the compensation plans mentioned in this Act. Such election shall be in the form prescribed by the board, and shall state whether such employer shall be bound by compensation plan number one, or compensation plan number two, or compensation plan number three, and a notice of such election, with the nature thereof, shall be posted in a conspicuous place in the place of business of such employer," *etc.*



"Sec. 3(i). It is the intention of this Act that any employer engaged in hazardous occupations as defined herein shall, before being bound by either of the compensation plans herein provided, elect to be so bound."

Standing alone, these provisions would be susceptible of but one construction, viz.: That the Act is not binding upon or applicable to a city until the city elects to be bound in the manner indicated in section 3(f), and that, when it makes its election, it not only *may*, but *must*, choose the particular one of the three plans under which it elects to proceed. But other provisions of the Act demonstrate that this could not have been the intention of the lawmakers. Section 3(e) provides: "Where a public corporation is the employer, \* \* \* the terms, conditions and provisions of compensation plan number three shall be exclusive, compulsory, and obligatory upon both employer and employee." The attorney general contends that, notwithstanding this language, the Act is elective as to every employer, a public corporation included, but that, whenever the public corporation employer elects to be bound by the Act, its power of election is exhausted, and it cannot choose from among the three plans the one under which it will operate, but must operate under plan No. 3. If this was the intention of the lawmakers, the least that can be said is that they made a superlative effort to conceal their intention in a multitude of useless words. To express the view of the attorney general, it was only necessary to say: "Whenever a public corporation elects to become subject to this Act, the provisions of compensation plan No. 3 shall be exclusive as to it." But the legislature did not so express itself; on the contrary, it declared that where a public corporation is the employer, the terms, conditions and provisions of compensation plan No. 3 shall be not only exclusive but compulsory and obligatory as well. It is a general rule of statutory construction that "every word of a statute must be given some meaning if it is possible to do so." (*State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932.) But, if the contention of the attorney general prevailed, the words "com-

pulsory and obligatory" would be meaningless. Other rules of construction which have been reduced to statutory form are: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Rev. Codes, sec. 7875.)

"In the construction of a statute the intention of the legislature  
 \* \* \* is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Sec. 7876.)

And section 24a of this Act declares: "Whenever this Act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court."

In *Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454, we said: "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part [3] of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy." The rule applies as well to different portions of the same statute. In *State ex rel. Bitter Root Valley Irr. Co. v. District Court*, 51 Mont. 305, 152 Pac. 745, we approved the following rule: "Where one part of a statute is susceptible of two constructions, and the language of another part is clear and definite and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render all clauses harmonious."

We think it is possible to reconcile the apparent inconsistencies in this Act and conform to the rules of construction just quoted. The expressions "every employer" and "any employer" used, respectively, in sections 3(f) and 3(i), above, and elsewhere in the Act, are used in the generic sense, and, if no qualifications appeared, would include every employer, a public

corporation as well as an individual. But section 3(e) carves out of the general class all public corporations acting as employers, so that the Act in its entirety is elective as to all private employers, but compulsory as to public corporations and contractors engaged in the performance of contract work for such public corporations. The city of Butte had no election, but was bound by the Act, as was its employee, from the time it became effective, July 1, 1915. There are certain considerations which lend color to this view:

(a) The legislature, in section 2(a) of the Act, created the Industrial Accident Board, and provided for the appointment of one member with a definite term of four years at a salary of \$4,000 per year. It also made further provision, in section 2(d), for bonding all three members of the board; in 2(g) for a seal; in 2(i) for a secretary; in 2(j) for other assistants and employees; in 2(n) for a supply of blank forms, *etc.*; and in section 23(a) appropriated \$50,000 from the general funds of the state for an administrative fund to carry on the work of the board—and all this, under the view of the attorney general, without any assurance that a single employer or employee would be subject to the Act, or that the elaborate machinery thus provided would ever be called upon to perform any function whatever.

(b) Section 40(m) provides: "If any employer shall default in any payment to the Industrial Accident Fund, the sum may be collected by an action at law in the name of the state." If the expression "any employer," as used herein, includes a public corporation, it includes the state; and, if the state should become delinquent in its contributions to the fund, it might sue itself to collect the amount due—a result too absurd to require further comment.

(c) As before observed, the same section—3(f)—which gives an election to every employer also requires *every employer* who has such election to designate his choice of the three plans under which he prefers to act. The words "every employer," as there

used, cannot possibly include a public corporation; for, if they do, section 3(e) is rendered meaningless.

(d) At the time the bill for this Act was under consideration by the legislature the impression was general throughout this country that an Act compulsory upon private employers would not be constitutional, whereas the right of the state to impose the provisions of the Act upon itself could not be questioned (*Wood v. City of Detroit* (Mich.), 155 N. W. 592.) There is some reason, therefore, to assume that the legislature made the Act compulsory as far as it was deemed possible to do so.

(e) If "every employer" must be held to include a public corporation in every instance, as contended by the attorney general, then the expression "every employee" would include an employee of a public corporation in every instance; but this cannot be true. Section 3(g) provides: "Every employee in the industries, works, occupations or employments in this Act specified as 'hazardous' shall become subject to and be bound by the provisions of that plan of compensation which shall have been adopted by his employer, unless such employee shall elect not to be bound by any of the compensation provisions of this Act." It cannot be doubted that, after the employer elects to come under the Act his employee may elect for himself whether he will become subject to the Act or not; but under section 3(e) the employee of a public corporation has no such election; he is bound by compensation plan No. 3.

The judgment of the district court is reversed and the cause is remanded, with directions to enter judgment reversing the order of the Industrial Accident Board rejecting the claim of Hugh Smith.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## PRITCHETT ET AL., RESPONDENTS, v. JENKINS, APPELLANT.

(No. 3,596.)

(Submitted February 10, 1916. Decided February 25, 1916.)

[155 Pac. 974.]

*Sales—Livestock—Breach of Contract—Measure of Damages—Evidence.***Parol Evidence—When Inadmissible.**

1. Admission of parol evidence to vary and contradict the terms of a written contract is error.

**Sales—Breach of Contract—Measure of Damages.**

2. Where defendant had agreed to sell and deliver 300 head of cattle at a time certain, and delivered but 248, the buyer was entitled to recover as damages the advance in market value of the 52 cattle sold, but not delivered, over and above the contract price.

[As to admissibility of subsequent parol agreement to vary written contract, see note in 56 Am. St. Rep. 659.]

*Appeal from District Court, Meagher County; J. A. Matthews, Judge.*

ACTION by Duff Pritchett and R. B. Minty, copartners doing business as Pritchett & Minty, against J. W. Jenkins. From a judgment for plaintiffs and an order denying him a new trial, defendant appeals. Modified and affirmed.

*Mr. N. B. Smith* and *Mr. Edward D. Phelan*, for Appellant, submitted a brief; *Mr. Phelan* argued the cause orally.

*Messrs. Mackel & Tyvant* and *Messrs. Ford & Linn*, for Respondents, submitted a brief; *Mr. Henry A. Tyvant* and *Mr. C. A. Linn* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiffs purchased from the defendant certain cattle, evidencing the transaction by an agreement in writing. They em-

ployed a blank form, the material portion of which, when filled in and executed, follows:

No. Head.	Description.	Brands.	Price per Head.	Time and Place of Delivery.
300	Mixed cattle (calves thrown in) or all cattle branded 5T Y	5T Y	35.00	White Sulphur Springs between Sept. 15th and Oct. 15th, 1912.

This action was brought to recover damages, the theory of the complaint being that the defendant had failed to make delivery according to the terms of his agreement. From a judgment in favor of plaintiffs for \$2,100 and from an order denying him a new trial, the defendant appealed.

The pleadings do not raise any issue of fraud, accident or mistake in the execution of the agreement. In their complaint the plaintiffs rely upon the written contract, and in his answer the defendant relies upon it as well. Singularly enough, upon the [1] trial each side, over the objection of the other, was permitted to introduce parol evidence which tended to vary and contradict the terms of the writing. The rulings were erroneous. (Secs. 5018, 5067, Rev. Codes; *Western Loan & Savings Co. v. Smith*, 42 Mont. 442, 113 Pac. 475; *Ford v. Drake*, 46 Mont. 314, 127 Pac. 1019.) The contract is plain and certain [2] in its provisions. The defendant agreed to deliver 300 cattle. He delivered only 248, and offered no legal excuse for his failure to deliver the remainder. The only question for determination was: To what extent, if any, did the market value of the fifty-two cattle sold, but not delivered, advance over and above the contract price? There is not any substantial conflict in the evidence upon this issue. The testimony justified plaintiff's claim that they were damaged to the extent of \$30 per head.

The order overruling the motion for a new trial is affirmed; the cause is remanded to the district court, with directions to

reduce the amount of the judgment to \$1,560 and costs, as of date June 24, 1913, and, as thus modified, it will stand affirmed. The appellant will recover one-half of his costs of appeal.

*Modified and affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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IN RE BUNSTON.

(No. 3,746.)

(Submitted January 31, 1916. Decided February 25, 1916.)

[155 Pac. 1109.]

*Attorneys—Professional Misconduct—Disbarment.*

1. A county attorney who used the powers of his office, by issuing warrants for the arrest of persons and filing informations against others, to compel them to make monetary settlements favorable to clients in his civil practice, was guilty of such misconduct as to warrant his disbarment.

[As to unprofessional conduct as ground for disbarment of attorney, see note in 45 Am. St. Rep. 81.]

PROCEEDINGS for the disbarment of H. W. Bunston. Accused disbarred, with leave to apply for reinstatement after one year upon condition.

*Mr. E. E. Lonabaugh*, of the Bar of Wyoming, for Accused.

MR. JUSTICE SANNER delivered the opinion of the court.

Charges having been filed against H. W. Bunston, a member of the Bar of this state, alleging professional misconduct in certain particulars, Honorable F. B. Reynolds, of Billings, was appointed commissioner of this court to hear the testimony and report the same, together with his findings of fact and conclusions of law. This has been done, and the substance of his

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As to disbarment or suspension of attorney for misconduct in an official capacity other than his attorneyship itself, see note in L. E. A. 1915A, 663.

findings, so far as we deem them material and supported by the evidence, is as follows:

(1) That the respondent is thirty years of age, possesses a university education, resides and practices his profession at Hardin, and since January 4, 1915, has been county attorney of Big Horn county.

(2) That William Flannery, claiming to have purchased from the Chicago, Burlington & Quincy Railroad Company certain ties, posts and wire, left by said company upon its abandoned line between Toluca Junction and Pryor Agency, employed respondent as his attorney to make collection of claims from various parties, including one C. B. Clark and wife, for the taking of portions of such ties, posts and wire, and three days after such employment the respondent prepared a criminal complaint and caused the arrest of said Clarks for receiving stolen property, to wit, a portion of said ties, posts and wire. Upon this complaint the Clarks were given a preliminary hearing, and on April 13, 1915, held to answer to the district court of Big Horn county. On May 12, 1915, the respondent called upon said Clarks for the purpose of procuring a settlement of Flannery's claim; but they, disputing Flannery's title to the property, offered to submit to a civil suit upon the claim and to give bond for the payment of any judgment that might be awarded against them. The respondent insisted on payment without civil suit and stated to C. B. Clark that, if such settlement was not made, the criminal proceeding would not be dismissed; whereupon and to avoid the filing of an information against himself and his wife, and understanding from respondent's statement that the criminal charge would be dismissed if the settlement were made, said Clark gave the respondent a check for \$160, saying that he would rather pay than submit to the criminal action; respondent took the check, cashed it, retained for himself \$40 as a fee, reserved for his associate counsel a like amount as a fee, and deposited in bank the sum of \$80 for Flannery. The respondent filed no information against the Clarks, or either of them, but on May 18, 1915, did file with the clerk of the district court of



Big Horn county a statement of his reasons for not further prosecuting said charge. Thereafter C. B. Clark demanded the return of the money so paid by him to respondent, on the ground that the same had been obtained through duress, but the respondent refused to make such return, although Flannery had not then approved the settlement or accepted the fruits thereof.

(3) That on April 15, 1915, in consequence of a difficulty at Wyola between the wife of one S. L. Young and a certain Miss Shaw, Mrs. Young by mistake threatened a Miss Pickering with a gun, supposing her to be Miss Shaw, causing the physical collapse of Miss Pickering as well as nervous shock to Mrs. Young. One Dr. Ashby, a woman physician, rendered assistance to both and later complained to respondent that S. L. Young had refused to pay her claim for such services; whereupon the respondent, though he knew and understood that S. L. Young had been guilty of no criminal act and was not liable to Dr. Ashby for any services rendered to Miss Pickering, wrote two letters to said S. L. Young on the letter-head of the county attorney's office, demanding that Dr. Ashby's claim be settled, in one of which he stated: "If a satisfactory reply is not received, together with a remittance for the claim made, you may expect criminal proceedings to be entered against you at once." And in the other of which he said: "The refusal on your part to pay the claim of Dr. Ashby was the straw that broke the camel's back, and unless it is straightened up \* \* \* you will have to face the music; if it is, I feel that you will have no particular cause to worry."

(4) That prior to July 29, 1915, one Carl Messing was a tenant of one D. S. Kearney. Difficulty arose between them, as a result of which Kearney threatened to kill Messing, and respondent as county attorney was asked to institute proceedings against Kearney to compel him to keep the peace. On July 29, the respondent went to Kearney's home accompanied by a deputy sheriff, to whom he had given what purported, to be, and on its face was, a valid warrant for the arrest of Kearney and there sought to secure an adjustment of the Messing affair. The negotiations not proceeding to his satisfaction, he instructed

the deputy out of Kearney's hearing to put Kearney under arrest. This, however, was not done; Kearney agreeing to give Messing a promissory note for \$190 secured by chattel mortgage. Thereafter respondent returned to Hardin, prepared and sent to Kearney for execution the chattel mortgage referred to. Said mortgage was returned to respondent who, out of the presence of Kearney and without any acknowledgment by Kearney of the execution of the same, certified as a notary public that said Kearney acknowledged before him the execution of said mortgage, and at the same time respondent himself made the affidavit of good faith required of the mortgagee, as agent of Messing.

(5) That it has been, and at the time of the Kearney matter was, the custom of respondent as county attorney to keep in his office blank warrants signed by the justice of the peace, and blank complaints with the signature of the justice of the peace to the affidavit thereto, so that, in the discretion of the respondent, he could fill in a complaint and warrant above the signatures and have the warrant served by the sheriff without the necessity of calling upon a justice of the peace to take action in the particular case. The warrant given to the deputy by respondent in the Kearney matter was of this character, no complaint whatever having been filed.

(6) That on September 29, 1915, respondent, as attorney for one Walsh, procured a judgment against one Edwards for about \$1,100, and shortly thereafter told Edwards that, if the judgment was not promptly paid, "other proceedings" would be instituted. Thereafter, on October 14, said judgment not having been paid, respondent, as county attorney, brought criminal action against Edwards, charging him with obtaining money by false pretenses. Upon this charge a preliminary examination was had, and Edwards was held to answer and committed to jail for want of bail. Thereafter, on November 4, 1915, Edwards was discharged from such commitment by the district court of Yellowstone county on *habeas corpus*. Meanwhile, respondent, anticipating the possible discharge of Edwards, prepared and

verified a second complaint charging Edwards with larceny as bailee, and, without such complaint being filed in any court, delivered a warrant of arrest to the sheriff, who immediately, upon the discharge of Edwards, served the same by taking Edwards into custody. Thereafter the complaint was filed in the justice court, but respondent had never any intention to prosecute said charge or to file said complaint, unless Edwards should be discharged on the *habeas corpus* proceedings above referred to.

The conclusions of the commissioner are that in the Kearney and Edwards transactions there was no professional misconduct on the part of respondent "except his use of blank complaints and warrants" and his certifying to the acknowledgment by Kearney of the chattel mortgage; that in the Clark transaction respondent was guilty of a violation of Code section 6402, of extortion as defined by Code sections 8663 and 8664, of malpractice involving moral turpitude, and of unprofessional conduct; that in the Young transaction respondent was guilty of blackmail as defined by Code section 8671, of malpractice involving moral turpitude, and of unprofessional conduct. The contention of respondent is that these conclusions are not warranted by the findings, and that the findings do not impute to him any culpable act.

We deem it unnecessary to say whether the conduct of respondent as exhibited by this record amounts to violations of the sections above referred to, or of other sections that may readily occur to the mind, since we have no sort of doubt that it was malpractice of the most serious character. Touching the Clark matter, there was evidence to show not only the naked facts found by the commissioner, but also that when Clark disputed Flannery's title to the property he also claimed to have taken it by permission of its custodian; that, when he invited a civil suit to settle the matter, respondent said he had been over the title business and had no doubt of Flannery's right, called attention to the fact that the time for filing the information would expire the following day, stated that after such filing

the matter would be harder for him to dismiss because it would have to be done in court, mentioned that, unless a settlement was tendered, the information would be filed, and asked Clark if he was willing to tender a settlement in case the information should not be filed; and that, among the reasons stated by the respondent to the court for not filing an information, were doubt of Flannery's title to the property, and respondent's belief that there was no intent to steal on the part of the Clarks. As avoiding the imputation of wrongdoing, the respondent suggests that there was no threat to accuse, because the Clarks had already been accused, and that they had paid no more than the just value of the property. We cannot admit the force of these propositions. An information by a county attorney charging the commission of an offense is as much an accusation as a complaint. The power vested in him and the duty imposed upon him, to file, or, in certain circumstances, not to file, an information after commitment by a magistrate, are the power and duty to accuse or not to accuse; it is the right of the state and of every person within the state to have that power exercised and that duty performed in every instance without price, and that right applied to the case of the Clarks, without regard to whether they did or did not pay for the property. So, too, the amount paid is not the point. Conceding the amount was just, it does not follow that it was justly due to Flannery, or that the Clarks could be justly deprived of their right to dispute his title and protect themselves from other possible claims. If, for the reasons stated to the court by the respondent himself, his duty was not to file an information, he could not lawfully file one in order to extract money from the Clarks to pay Flannery, whose right thereto was disputed and, in his own language, open to doubt.

For the Young letters, not the shadow of an excuse is offered. Yet they were a deliberate threat by the respondent to exercise his power as county attorney to prosecute for crime a man confessedly innocent of crime unless that man should pay a civil claim none of which he had personally incurred and for a portion of which he was not even liable. A thing of this sort would

not have been permitted in the days of old when men were jailed for debt; the unfortunate was always given a chance to dispute the debt, and, if he was found to owe and could not pay it, he was branded as a debtor, but not as a criminal. The passage of those days is a matter of history, and a university graduate with capacity sufficient to become an attorney at law cannot plead ignorance of a matter of such elementary and universal knowledge as that civil claims can be enforced only by civil means.

The plea of exoneration, based on the belief of the commissioner that in the Clark and Young transactions the respondent did not deliberately intend to do wrong, and did not seek to profit by the Young affair, cannot be entertained. That he intended to do just what he did do is unquestioned, and it is too late in the twentieth century to say that such conduct, exhibiting, as it does, an utter indifference to the solemn responsibilities reposed in a prosecuting officer, and invading, as it does, the most sacred rights of the citizen, involves no moral obliquity, whether or not the respondent profited or sought to profit thereby.

With the disposition exhibited in the Clark and Young matters to use the power of the county attorney in furtherance of objects in no wise connected with the duties of that office, the course of procedure adopted in the Edwards matter seems entirely consistent. The commissioner has found, however, that the "further proceedings" threatened in that matter were an equity suit. As there is some evidence to warrant this view, we shall not include the Edwards matter as a basis for respondent's condemnation; save as regards the habit of keeping and issuing warrants at his pleasure, without the existence of sworn complaints duly filed to authorize them.

Not only do these modern "*lettres de cachet*" also appear in the Kearney matter, but that matter presents two other improprieties, *viz.*, respondent's certificate as a notary public to the effect that Kearney had appeared and acknowledged the execution of the chattel mortgage to Messing, when such was not the

fact, and his affidavit to the good faith of the mortgage as agent for Messing, when his authority to make it was doubtful, to say the least. We mention these in passing, for, though not embraced within the charge as filed against respondent, they form the subject matter of a finding by the commissioner to which no exception has been taken, and illustrate what the commissioner calls the respondent's "lack of a clear perception of the moral and professional obligations resting upon him as a member of the Bar of this state."

It is our opinion that attorneys so afflicted are not to be trusted with the serious and important duties which it falls to the profession to perform, but should in all cases be accorded an opportunity to acquire the requisite perception. It is therefore ordered that respondent's name be stricken from the roll of attorneys of this state, and that he be debarred from practicing law directly or indirectly; with leave, however, to apply for reinstatement after one year, upon showing to the satisfaction of this court that he has acquired a due appreciation of the moral and professional obligations resting upon members of the Bar.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE ~~EX~~ REL. SCOLLARD, RESPONDENT, v. BOARD OF  
EXAMINERS FOR NURSES ET AL., APPELLANTS.

(No. 3,587.)

(Submitted February 11, 1916. Decided March 1, 1916.)

[156 Pac. 124.]

*Mandamus—Board of Examiners for Nurses—Public Office and  
Officers—Good Moral Character—Evidence—Official Oath.*

Nurses—Board of Examiners—Public Office and Officers—Undertaking  
on Appeal.

1. Under Section 7196, Revised Codes, the board of examiners for nurses, being a public office and its members public officers, is relieved from filing a bond on appeal from a judgment compelling it by writ of mandate to recommend to the governor an applicant for certification as a registered nurse.

Same—Official Oath.

2. The fact that Chapter 50, Laws of 1913, creating the board of examiners for nurses, does not provide that the members thereof take an official oath, cannot detract from their character as public officers, since Section 1 of Article XIX of the Constitution, requiring every public officer within the state to take the oath therein prescribed, is self-executing.

Same—Good Moral Character—How Determined by Board.

3. In its determination of the question whether an applicant for registration as a nurse possesses the good moral character made a prerequisite to certification by Section 9 of the Act, the board of examiners is not bound to accept affidavits of citizens deposing to such good character as conclusive, but may hear evidence, to be produced before it in such manner as it may choose to adopt, both in opposition to as well as in favor of the applicant.

Same—*Mandamus*—Does not Lie—When.

4. In the absence of a clear showing that the board abused the discretion lodged in it in determining whether relator was a proper person to be recommended to the governor for certification as a registered nurse, the writ of mandate did not lie.

Same—Character of Applicant—Evidence.

5. Testimony touching the immoral character of the applicant, introduced at a divorce proceeding to which she was a party, could rightfully be taken into consideration by the board in passing upon the question of her character.

*Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.*

APPLICATION by the State of Montana, on the relation of Alise B. Scollard, for writ of *mandamus* against the Board of Examiners for Nurses and the members thereof. From a judgment awarding a peremptory writ and an order denying a new trial,

respondents appeal. Judgment and order reversed and cause remanded, with directions to dismiss.

*Messrs. Geo. D. Pease, J. J. McCaffery and Percy Napton*, for Appellants, submitted a brief; *Mr. Pease* argued the cause orally.

In this proceeding the presumption of law is that the decision or judgment of the board was one of merit, that the board acted within its discretion and that the official duty has been regularly performed. (*San Luis Obispo County v. Gage*, 139 Cal. 398, 73 Pac. 174.) The duty devolves on the board to act, but if the board has discretion, and, in the exercise of that discretion has acted, the writ of *mandamus* does not lie to compel the board to act in a particular way or to exercise a particular discretion if there has been no abuse of the discretion exercised. (*State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 436, 120 Pac. 485.) *Mandamus* will not issue to enforce a right which is in substantial dispute. (26 Cyc. 153; *Williams v. Smith*, 6 Cal. 91; *Davis v. Jewett*, 69 Kan. 651, 77 Pac. 704; *People v. Curtis*, 41 Mich. 723, 49 N. W. 923; *State v. Clark* (*State v. Tillyer*), 69 N. J. L. 609, 55 Atl. 690; *People v. Board of Canvassers*, 88 N. Y. App. Div. 185, 84 N. Y. Supp. 406; *State v. Hastings*, 10 Wis. 518.) Neither will *mandamus* lie to enforce a right which is conditional or incomplete by reason of conditions precedent which are to be performed by the petitioners. (26 Cyc. 154.)

The case of *Commonwealth ex rel. Scott v. Board of Education*, 187 Pa. 70, 41 L. R. A. 498, 40 Atl. 806, is on "all-fours" with the case at issue. The board of education in that case was clothed with the discretionary power to determine the qualifications of teachers. It exercised its right of discretion by disqualifying female teachers, and the court held that such action could not be disturbed in a *mandamus* proceeding. The general rule may be found in 26 Cyc. 283. (See, also, *Bailey v. Ewart*, 52 Iowa, 111, 2 N. W. 1009.)



*Messrs. Nolan & Donovan*, for Respondent, submitted a brief; *Mr. Louis P. Donovan* argued the cause orally.

Upon the hearing of the application for the writ of mandate in such cases, the court does not try the case *de novo*, but hears and determines it upon the record made before the board (*State v. Chittenden*, 112 Wis. 569, 88 N. W. 587; *Inglin v. Hoppen*, 156 Cal. 483, 105 Pac. 582, 585; *Board of Prison Commissioners v. De Moss*, 157 Ky. 298, 163 S. W. 183; *People v. Circuit Judge*, 36 Mich. 274), and the only question is whether or not the board has acted within its discretion, and in determining this question, the court can look only to the showing that was made before the board upon which its order was necessarily based. Facts not appearing before the board naturally could not be made the basis for the order made by the board.

The statute requires that the applicant for registration shall make a satisfactory showing of her good character, but this is an *ex parte* showing. The statute does not permit that showing to be contradicted, makes no provision for charges being filed against the applicant, does not authorize the board to hear testimony against the applicant, nor permit any other person to furnish testimony respecting her character, either for or against her. It merely requires, as a condition precedent to her being admitted, that she shall furnish satisfactory evidence of her good moral character. It shows that the legislature contemplated that if she made a sufficient *ex parte* showing of her good character, then she should be registered, subject, of course, to the power of the governor upon recommendation of the board to revoke her certificate for any of the reasons set out in section 15. Such has been the holding of the courts under somewhat analogous statutes. (*State ex rel. Hallen v. Utah State Board*, 37 Utah, 339, 108 Pac. 347; *In re License*, 143 N. C. 1, 10 Ann. Cas. 187, 10 L. R. A. (n. s.) 288, 55 S. E. 635.)

If the court should be of the opinion that the board had a right to try, at the time of the nurse's application, the question of her good moral character, then the Constitution requires that a charge against her should be filed, and that she should

be advised of the nature and the cause of the accusation. (*State v. Kellogg*, 14 Mont. 426, 36 Pac. 957; *State v. Schultz*, 11 Mont. 429, 28 Pac. 643.) And the party accused must be given a right to be heard before she is condemned. (*State v. Schultz, supra.*) It is true that the cases above cited relate to the revocation of licenses already issued, but there can be no distinction in principle between the right of the accused to be heard in such cases, and the right to be heard when the accusation is made the basis of preventing the issuance of a license. In either case the purpose of the accusation is to deprive the accused person of a valuable right which she would otherwise have. This right should not be taken from her or denied her without due process of law. (*Gage v. Censors etc. Medical Society*, 63 N. H. 92, 56 Am. Rep. 492.)

The testimony of Pender is without value, because it does not prove, or tend to prove, the general character of the relatrix for morality. Aside from all other objections to it, it relates only to a single act alleged to have taken place some two years before the date of Mrs. Scollard's application. Character is not made or unmade by a single act. (3 Ency. of Evidence, 36-39; Jones on Evidence, sec. 149.) The alleged act referred to in the transcript cannot be made the ground for excluding the relatrix from her occupation as a nurse, for the reason that the statute was not in force at the time of the alleged commission of the act in question, and, therefore, cannot operate upon the same unless the statute be given a retrospective construction. There is nothing in the Act itself indicating that it should have a retrospective construction, and under such circumstances it should take a prospective construction only. (36 Cyc. 1205-1208; see, also, *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761.) To give the statute a retrospective operation would render its constitutionality doubtful. (Art. III, sec. 11, Constitution of Montana; Art. I, sec. 10, Constitution of the United States; *Cummings v. Missouri*, 4 Wall. (71 U. S.) 277; 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. (71 U. S.) 333, 18 L. Ed. 366.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In December, 1913, Alise B. Scollard made application to the board of examiners for nurses to be recommended to the Governor for a license as a registered nurse, under Chapter 50, Laws of 1913. The application was refused, and proceedings in *mandamus* instituted. From a judgment awarding the peremptory writ and from an order denying them a new trial, the defendants appeal.

#### ON MOTION TO DISMISS.

Appellants did not furnish any appeal bond, and the respondent insists that the appeals should be dismissed. Section 7196, Revised Codes, relieves the state, a county, a municipal corporation, or any officer in his official capacity on behalf of the state, a county, *etc.*, from furnishing an undertaking where one is otherwise required. It is insisted that the board of examiners for nurses is not a public office, and that the members are not public officers. In passing we may say that, if the members of the board acted only as private individuals in refusing Mrs. Scollard's application, then *mandamus* would not lie at all. (26 Cyc. 386.) But we do not agree with respondent's contention. In 6 Words and Phrases will be found a large number of definitions of "public office" and "public officer," from which we select the following: "A public office is the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by and for the benefit of the public. The individual so invested is a public officer." (*Attorney General v. McGaughey*, 21 R. I. 341, 43 Atl. 646, 647.)

In 1913 the state for the first time assumed to exercise to a limited extent its police power to regulate the business or profession of nursing. It created the board of examiners for nurses, provided for the appointment of the members by the governor

for a definite term, prescribed the duties, and fixed the compensation. This is sufficient to meet the requirements of the definition.

It is said that the Act does not require a member to take an [2] official oath; but it is wholly unnecessary that it should do so. The official oath required of every public officer in this state is prescribed by section 1 of Article XIX of the Constitution, and that provision is self-executing. The board of examiners for nurses is a public office, and its members are public officers. They perform duties for the state, public in character, and the extent of those duties is not of consequence in determining the quality of their acts. The motion to dismiss is overruled.

#### ON THE MERITS.

It is set at rest in this state that no one has any right whatever to hold herself out or practice as a *registered* nurse, except upon such terms and conditions as the state may prescribe. (*State ex rel. Marshall v. District Court*, 50 Mont. 289, 146 Pac. 743.) Mrs. Scollard's application to the board was accompanied [3] by affidavits of citizens that she is a person of good moral character, and it is the contention of her counsel that the board was compelled to accept such showing as conclusive, and that no trial or other investigation touching the question of her good or bad character can be had until after she is regularly registered and proceedings have been instituted to cancel her certificate, under the provisions of section 15 of the Act. But for the earnestness of able counsel in this contention we should not consider the meaning of the statute open to doubt or discussion. Chapter 50, Laws 1913, designates three classes of persons who will become subject to its provisions if they seek registration as nurses in this state: (1) Those who must take the examination; (2) certain graduates of reputable training schools; and (3) nurses registered in other states. Mrs. Scollard belongs to the second class, and, while members of class 2 or 3 are relieved from taking the examination as to proficiency, every applicant of every class is required by section 9 to furnish satisfactory evidence that she is a person of good moral character. After

a nurse is once *registered*, her license may not be revoked except upon conviction after a hearing had in proceedings instituted and carried on pursuant to section 15. Having been *registered*, she has acquired a valuable right which the state has seen fit to protect. But, when she applies for registration, she occupies no such advantageous ground. She is then a mere suitor for a privilege which the state may grant or withhold at its pleasure. It has seen fit to say that an applicant presenting evidence of certain training, who is at least twenty-two years of age and of good moral character, may be *registered* and receive the sanction of the state to hold herself out as a *registered* nurse. It has created this board of examiners for nurses for the very purpose of having practical means for determining whether a particular applicant shall be licensed, and to that extent recommended, by the state as a fit and proper person to go into the homes of respectable people and administer to the sick or afflicted. From the necessities of the case the professional services of a skilled nurse are of the most intimate, confidential and important character. Extreme cases often best illustrate principles. If a veritable drug fiend, with the characteristic impulse to want everyone else to become addicted to the same vicious habit, applies for registration, must the board recommend her because she has been able to deceive a few reputable citizens into the belief that she is a person of good moral character, when the members of the board have personal knowledge or satisfactory evidence from other sources as to the actual facts? Common sense and the instinct which discerns right from wrong prompt a negative answer in the most emphatic form. The state does not offer to stand sponsor for such a person, and, to avoid being imposed upon as far as may be possible, has created this board for the express purpose of determining whether an applicant is a fit and proper person to receive the state recommendation. The language of section 9 of the Act is not susceptible of any other interpretation. Satisfactory evidence of good moral character, as therein used, means evidence which satisfies the board, in the exercise of honest judgment (*State ex rel. Bray v. Settles*,

34 Mont. 448, 87 Pac. 445) ; and to reach a judgment the power to investigate and decide is necessarily implied. It would be unreasonable for the legislature to impose upon a board of laymen the strict rules of legal procedure which prevail in courts, and it did not do so in this instance, but left the board free to pursue its work with as little formality as possible, to the end that it might carry out efficiently the purpose of the Act. The very grant of power to the board to determine upon the question of the applicant's good character implies power to hear evidence in opposition as well as in favor of the applicant. The manner in which the evidence is to be produced is left with the board. The statute does not contemplate a trial of, or a hearing on, an application for recommendation to the governor. It might have provided for one or the other, but did not do so. It does, however, contemplate an investigation in such reasonable manner as the board may choose to adopt, and, if its decision is the result of honest judgment, it is conclusive upon an applicant who belongs to the second class.

It is elementary that *mandamus* will lie to compel the board [4] to act, but that it cannot control the board's discretion (*State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485), and the district court is not authorized to substitute its judgment for that of the board. The only question before the trial court was: Did the board act so arbitrarily or capriciously, or abuse its discretion, to that extent that it cannot be said to have rendered an honest judgment upon Mrs. Scollard's application? The burden was upon this respondent to show that such was the fact, and, in the absence of a clear showing of abuse of discretion or a determination reached by other improper means, the court was not warranted in issuing the writ. (*State ex rel. Finlen v. District Court*, 26 Mont. 372, 68 Pac. 465.)

As tending to impeach the good character of Mrs. Scollard, [5] the board had before it the official stenographer's transcript of testimony given upon a hearing had in the district court of Gallatin county in a proceeding wherein Mrs. Scollard was plaintiff and her husband was defendant. That transcript

contained, among other things, the testimony of one P. A. Pender, which referred to acts of immorality on the part of Mrs. Scollard of the most degenerate sort. The board had before it also certain resolutions adopted by the Gallatin County Graduated Nurses' Association protesting against the recommendation of Mrs. Scollard for registration, upon the ground that she was addicted to the use of morphine and was not a person of good moral character. The testimony of Pender contained in the stenographer's report was to all intents and purposes a deposition, taken in another proceeding it is true, but one to which Mrs. Scollard was a party. However, the form in which it was presented was immaterial. No member of the board is authorized to administer an oath to a witness, not even in a proceeding had under section 15; but the board may accept such statements orally or in writing as the members deem material and give to them such weight as, in their judgment, they are entitled; for, as we have observed before, this is not a trial, but merely an investigation. Under section 1 the governor is constituted the licensing authority. To relieve him of the burden of making the investigation necessary to determine the qualifications which the legislature prescribed for an applicant for registration, this board was created. In passing upon the question of the character of an applicant, it acts as a mere administrative arm of the government, and may pursue its investigations through the same channels as the governor might, if the entire burden of administering the Act were cast upon him. If the members of the board chose to believe the testimony of Pender, they could not in honor recommend Mrs. Scollard for registration. They were at liberty to believe that testimony, and apparently did so, and, with it before them, their act in refusing to recommend her cannot be charged to prejudice, such as precludes the exercise of judgment. There was not any evidence before the trial court of any failure on the part of the board to exercise a wise and honest discretion, except such as is implied from their refusal to recommend Mrs. Scollard; and,

since there was justification for the refusal, the trial court erred in its conclusion.

The judgment and order are reversed and the cause is remanded, with directions to dismiss the proceeding.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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RYAN, APPELLANT, v. JOHNSON ET AL., RESPONDENTS.

(No. 3,597.)

(Submitted February 14, 1916. Decided March 2, 1916.)

[155 Pac. 971.]

*Malicious Prosecution—Want of Probable Cause—Failure to Establish—Nonsuit.*

1. In an action by an attorney for malicious prosecution in instituting and carrying on a proceeding for his disbarment, a nonsuit was properly granted for failure of plaintiff to show want of probable cause, without the establishment of which element plaintiff in such an action cannot prevail.

[As to probable cause as defense in action for malicious prosecution, see note in 93 Am. St. Rep. 458.]

*Appeal from District Court, Teton County; J. B. Leslie, Judge.*

ACTION by David J. Ryan against A. D. Johnson and others. From a judgment of nonsuit and an order denying a new trial, plaintiff appeals. Affirmed.

Mr. David J. Ryan, submitted a brief in his own behalf; Mr. C. A. Spaulding, of Counsel, argued the cause orally.

Messrs. Walsh, Nolan & Scallon and Mr. R. M. Hattersley, for Respondents, submitted a brief; Mr. C. B. Nolan, argued the cause orally.



MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1912 charges of unprofessional conduct were preferred against David J. Ryan, a member of the Bar of this state. He was tried and acquitted (*In re Ryan*, 46 Mont. 289, 127 Pac. 904), and thereafter commenced this action to recover damages against the persons whom he held responsible, charging them with malicious prosecution in instituting and carrying on the disbarment proceedings. The trial court granted a nonsuit, and from the judgment entered thereon and from an order denying him a new trial, plaintiff appealed.

In *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, [1] 138 Pac. 189, we held that to make out a *prima facie* case of malicious prosecution the plaintiff must allege and prove: "(a) That a judicial proceeding was commenced and prosecuted against him; (b) that the defendant was responsible for instigating, prosecuting or continuing such proceeding; (c) that there was a want of probable cause for defendant's act or acts; (d) that he was actuated by malice; (e) that the proceeding terminated favorably to plaintiff; and (f) that plaintiff suffered damage, with the amount thereof." Plaintiff in this instance did not meet those requirements. His evidence fails altogether to disclose want of probable cause on the part of the defendants in prosecuting the disbarment proceedings. No useful purpose could be served in making even a brief summary of the testimony. We have considered it carefully, and are certain the learned trial judge was correct in his ruling.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## DEGENHART, APPELLANT, v. CARTIER ET AL., RESPONDENTS.

(No. 3,598.)

(Submitted February 11, 1916. Decided March 2, 1916.)

[157 Pac. 637.]

*Chattel Mortgages—Attaching Creditors—Rights of Subrogation—Right of Mortgagee.***Chattel Mortgages—Attaching Creditors—Deposit—Effect of Making—Right of Mortgagee.**

1. By depositing with the county treasurer (Rev. Codes, sec. 5766) the amount of a prior mortgage on property which he seeks to attach, a creditor does not pay the debt secured thereby or discharge the mortgage, but is substituted to the right of the mortgagee to have recourse to the mortgaged property; a destruction of this right of recourse, by connivance between the mortgagor and mortgagee, is redressible in damages.

**Same—Case at Bar.**

2. To enable a creditor to attach cattle on which there was a chattel mortgage, he deposited with the county treasurer, payable to the mortgagee, the amount secured thereby, but before the levy of the writ could be made, the defendant mortgagor, in connivance with the mortgagee, placed a second mortgage in favor of the latter on the property; after the levy had been made, the defendants demanded the release of the cattle because of the prior lien of the second mortgage; the sheriff released, and, upon demand made, the amount of the deposit was paid over to the defendants, the mortgagee satisfying the first mortgage of record. In an action to recover the deposit made by the attaching creditor, the complaint setting forth the above facts at length, *held* to state a cause of action.

**Same—Making Deposit—Who not Interested in.**

3. The provision of section 5766, Revised Codes, requiring an attaching creditor to tender or deposit the amount of a prior mortgage with interest, was designed solely for the benefit of the mortgagee, and therefore neither the mortgagor nor a junior creditor was concerned in such deposit.

*Appeal from District Court, Granite County; Geo. B. Winston, Judge.*

ACTION by Lee C. Degenhart against George A Cartier and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Mr. S. P. Wilson, for Appellant, submitted a brief and argued the cause orally.

The authorities often state the maxim of law that there is no wrong without a remedy. Neither is it necessary that there

should be precedent for every action for every remedy that is sought in the courts. (Cooley on Tort, 1st ed., 19; 1 R. C. L., 322; *Kujek v. Goldman*, 150 N. Y. 176, 55 Am. St. Rep. 670, 34 L. R. A. 156, 44 N. E. 773; *Pavesich v. New England M. L. Ins. Co.*, 122 Ga. 190, 106 Am. St. Rep. 104, 2 Ann. Cas. 561, 69 L. R. A. 101, 50 S. E. 68.) Section 5766, Revised Codes, provides the rights and procedure of an attaching creditor against mortgaged personal property. This section clearly was intended for the benefit of the attaching creditor. (*Moore v. Calvert*, 8 Okl. 358, 58 Pac. 627; *Willson v. Felthouse*, 90 Iowa, 315, 57 N. W. 878; *Tollerton & Stetson Co. v. Skelton*, 118 Iowa, 543, 96 Am. St. Rep. 409, 92 N. W. 651.) Apparently the attaching creditor can pursue no other course, but is obliged to make the deposit. (7 Cyc. 54.)

First Cause of Action: The general theory of the law in reference to liens and mortgages is that when a third person pays the same for the protection of some right of his own, such payment does not constitute a satisfaction of the mortgage, or a release of the original debtor, but merely serves to subrogate the rights of the third person making the payment to the rights of the mortgagee in the mortgage. (27 Cyc. 1221, 1222; *Gerrity v. Wareham Savings Bank*, 202 Mass. 214, 88 N. E. 1084; *Everett v. Gately*, 183 Mass. 503, 67 N. E. 598; *In re Automobile Livery Service Co.*, 176 Fed. 792.) The same rule applies to chattel mortgages. The case of *Moore v. Calvert*, *supra*, lays down the broad equitable rule that where a deposit is made, as was done by appellant here, to pay a prior recorded chattel mortgage to enable the depositor to subject the mortgaged property to the payment of his claim, the deposit, while technically a legal payment of the mortgage, is in equity a subrogation of the depositor to the rights of the mortgagee, when for any reason the attachment proceedings fail. And when one person interferes with the legal rights or property of another, he commits a tort for which he is liable in damages. (38 Cyc. 415.) The lien of a chattel mortgage or an equitable lien arising out of a chattel mortgage is property that will be protected by law.

An action will lie for any wrongful act that causes the destruction or loss of the security of a lien. (*Mechanics' Savings Bank v. Thompson*, 58 Minn. 346, 59 N. W. 1054; *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960; Jones on Liens, sec. 1035; 3 Joyce on Damages, secs. 1915-1919.) Plaintiff has a cause of action in damages. (*Van Pelt v. McGraw*, 4 N. Y. 110.)

Second Count: This count is directed against the defendant Power, and is based upon the proposition that he had and received from the county treasurer money which in equity and good conscience, under the circumstances, he ought not to retain, but should return to appellant, and that thus the law implies a promise and obligation on the part of Power to repay the same to the plaintiff. (*Merchants' & M. Nat. Bank v. Barnes*, 18 Mont. 336, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218; *Dresser v. Kronberg*, 108 Me. 423, Ann. Cas. 1913B, 542, 36 L. R. A. (n. s.) 1218, 81 Atl. 487.) Where money is paid for a particular consideration, and the consideration fails, an action for money had and received will lie for its return. (27 Cyc. 855; *Rogers v. Walsh*, 12 Neb. 28, 10 N. W. 467; *Warder etc. Co. v. Myers*, 70 Neb. 15, 96 N. W. 992; *Ripley v. Case*, 86 Mich. 261, 49 N. W. 46; *Dashaway Assn. v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Reina v. Cross*, 6 Cal. 29; *Burk v. Milwaukee, L. S. & W. Ry. Co.*, 83 Wis. 410, 53 N. W. 692; *American etc. Bank v. Loretta G. & S. M. Co.*, 165 Ill. 103, 56 Am. St. Rep. 236, 46 N. E. 202.)

Where money is received to be applied to a particular purpose and it is not applied to that purpose, an action in money had and received will lie by the one who pays the money against the one who receives it. (27 Cyc. 862; *Gillespie v. Evans*, 10 S. D. 234, 72 N. W. 576; *Stewart v. Phy*, 11 Or. 335, 3 Pac. 443; *Dennis v. Pabst Brewing Co.*, 80 Minn. 15, 82 N. W. 978; *O'Donnell v. Perrin*, 77 Mich. 173, 43 N. W. 774; *Clark v. Jenness*, 188 Mass. 297, 74 N. E. 343; *Messenger v. Votaw*, 75 Iowa, 225, 39 N. W. 280; *Ph. Zang Brewing Co. v. Bernheim*, 7 Colo. App. 528, 44 Pac. 380.)

Third Count: If appellant was entitled to receive back his deposit from the treasurer at the time defendant Power demanded and received the same, then trover lies for conversion of the fund. (*Morrin v. Manning*, 205 Mass. 205, 91 N. E. 308; *Dunham v. Cox*, 81 Conn. 268, 70 Atl. 1033; 38 Cyc. 2014.)

*Mr. Wingfield L. Brown*, for Respondents, submitted a brief and argued the cause orally.

Section 5766, Revised Codes, must be strictly construed and followed both in its procedure and the method in which the attaching creditor is to be repaid the money advanced by him to pay the mortgage debt. (2 Cobbey on Chattel Mortgages, sec. 718.) The theory of the statute invoked by the appellant that invested him with the privilege of paying the mortgage debt is the extinguishment of the debt thus secured, so as to enable the lien of attachment to take effect; and whether the appellant paid the money and failed to have the mortgaged chattels seized under the writ of attachment, or whether he caused the property to be seized and later consented to their release, he was confined to the course he adopted when he voluntarily used the provisions of the statute to aid him, and the only lien he could possibly secure would be the lien of attachment. He could not in any manner avail himself of both; the lien of attachment and the lien of mortgage being incompatible, they could not coexist. (*Cheney v. Caldwell*, 20 Mont. 77, 49 Pac. 397; *Cochrane v. Rich*, 142 Mass. 15, 6 N. E. 781; *Baumgartner v. Vollmer*, 5 Idaho, 340, 49 Pac. 729; *Carstenbrook v. Wedderien* 7 Cal. App. 465, 94 Pac. 372.) The payment of the mortgage debt by the attaching creditor simply gave him the right to enforce his claim under the writ of attachment. The mortgage was, by the payment of the same by the appellant, discharged, and it was not within his power to revive it or re-establish a lien thereunder. (See 2 Cobbey on Chattel Mortgages, sec. 718; *Cochrane v. Rich*, 142 Mass. 15, 6 N. E. 781; *Baumgartner v. Vollmer*, 5 Idaho, 340, 49 Pac. 729; *Carstenbrook v. Wedderien*, *supra*; *Bell-Wayland Co. v.*

*Miller M. Co.*, 39 Okl. 4, Ann. Cas. 1915D, 780, 130 Pac. 594; *Moore v. Calvert*, 8 Okl. 358, 58 Pac. 627.)

The cases cited by appellant as giving a right of action in cases where the execution or attachment fail, do not intimate that a person who abandons his process of execution or attachment is entitled to any relief. They refuse him the relief asked on that very ground. There is a difference between the failure of process, and its nonenforcement at the election of the party who is entitled to have it enforced. In the latter case the execution or attachment remains a living, vital force to execute the will of the one who is responsible for its existence. When he abandons it, it becomes dormant and useless unless revived by action.

MR. JUSTICE SANNER delivered the opinion of the court.

The judgment from which this appeal is taken was entered after a general demurrer to the complaint, filed by defendants jointly, had been sustained; the plaintiff declining to further plead. Hence the only question before us is whether a cause of action is stated against any of the defendants upon any theory.

The purpose of the action is to recover the sum of \$1,012.80, with interest. The complaint is in three counts, doubtless so framed to meet the supposed exigencies of classification. We do not deem the attempt thus made to classify the action as of great importance, since it is the facts pleaded upon which recovery must be had. These facts, as set forth in the first count, are: That on February 26, 1913, the plaintiff brought an action upon account to recover the sum of \$397.51 then due him from the defendant George A. Cartier, caused a writ of attachment to issue therein, and placed said writ in the hands of the sheriff for levy and service; that the only property possessed by said Cartier not exempt from execution was certain livestock of the value of \$1,600, which property was subject to a chattel mortgage to the defendant Power for \$1,000, duly filed; that the plaintiff, being desirous of attaching said property and for

the sole purpose of enabling a levy of the writ to be made thereon, deposited with the county treasurer, payable to Power, the amount due upon said chattel mortgage, to-wit, \$1,012.80, as required by the provisions of section 5766, Revised Codes; that the sheriff proceeded to make the levy, but before he could reach the property the defendants, who had learned of the filing of plaintiff's complaint, of the issuance of said writ, of said deposit, and of the purpose for which it was made, did, with the purpose of defrauding the plaintiff out of said deposit, cause said property to be encumbered with a second chattel mortgage, dated February 26, 1913, executed by the defendant George A. Cartier to the defendant Power for \$675, and filed; the writ meanwhile was levied, and on February 27, 1913, the defendants served upon the sheriff a written demand that, because Power claimed a lien on the property by virtue of the mortgage last mentioned, the sheriff release said property from the levy; that the sheriff released, and thereupon the defendants demanded and received from the county treasurer the moneys which had been deposited by the plaintiff, and caused to be indorsed upon said chattel mortgage a certificate by said Power to the effect that said chattel mortgage had been fully paid, satisfied, and discharged; that thereafter the defendants caused other and further encumbrances to be given and placed upon said property, and caused said property to be sold and disposed of, and to come into the hands of innocent purchasers; that the defendants Cartier are insolvent, and the defendant Power has kept the moneys deposited by the plaintiff with the treasurer and paid over by the treasurer to said Power; that the acts and things above mentioned as done by the defendants were wrongfully and fraudulently done, for the single purpose of preventing, as they did prevent, the plaintiff from proceeding with his attachment or getting back his deposit, to his damage in the sum of \$1,012.80, with interest.

In the second count, which takes the form of an action for money had and received, and in the third count, which takes the form of an action in conversion, the acts complained of

are imputed to Power alone; but the theory underlying the [1-3] whole complaint is that the deposit by the plaintiff of the amount due on Power's first mortgage did not pay the debt secured thereby or discharge the mortgage, but served to subrogate the plaintiff to the right of Power as such mortgagee; that the defendants could not lawfully destroy the right of recourse as against the mortgaged property for the amount so paid, thus obtained by the plaintiff; that they did destroy it when, under the circumstances stated, Power certified of record that the chattel mortgage had been fully paid, satisfied, and discharged, and in so doing committed a wrongful act, redressible in damages. We think this position is substantially correct. A creditor desiring to attach chattels, must, under section 5766, pay, tender or deposit "the amount of the mortgage debt and interest," in other words, he must protect the mortgagee; but he is not required to pay, and does not satisfy, the mortgage; on the contrary, his right to look to the property for reimbursement of the sum paid to the mortgagee, is expressly recognized. The statute was designed solely for the benefit of the mortgagee. He alone could complain in the first instance if the property were seized under attachment without regard to his mortgage, and neither the mortgagor nor a junior creditor has any concern in the payment made to him by the creditor seeking to attach. This being so, it cannot be supposed that the debt secured by the mortgage is extinguished without the expenditure of a single cent by the debtor, or that, should the attachment fail, the attaching creditor must lose, not only the security he hoped to obtain by the attaching for his original demand, but also the sum paid to place the mortgage lien in abeyance pending the attachment. Under statutory conditions similar to ours it has been recognized that a right in the nature of subrogation does vest in the attachment creditor who pays the amount of a prior mortgage, and if his attachment should fail he still has recourse to the property for the amount paid to the mortgagee. (*Moore v. Calvert*, 8 Okl. 358, 58 Pac. 627; *Bell-Wayland Co. v. Miller-Mitscher Co.*, 39 Okl. 4, Ann. Cas. 1915D, 780, 130 Pac. 593; *Car-*



*stenbrook v. Wedderien*, 7 Cal. App. 465, 94 Pac. 372; *Deering v. Wheeler*, 76 Iowa, 496, 41 N. W. 200; *Armstrong v. McAlpin*, 18 Ohio St. 184.) As that right is a property right, he cannot be justly deprived of it by anyone, let alone the debtor, who has paid nothing, or the mortgagee, to whose claim against the property he has, in legal effect, succeeded. In our opinion, therefore, to destroy that right, as the complaint alleges it was destroyed in this instance, was a wrong, whether done by all the defendants, or by Power alone, and for it recovery can be had against the guilty party.

Counsel for respondents present this case as though the right of Power to procure the second mortgage, and with it to win an honest race of diligence against the plaintiff's attachment, were the questions involved; but these are not primary considerations, because the plaintiff is not seeking to recover for the loss of his attachment security. It is also argued that no recovery based upon the satisfaction of the mortgage by Power can be had, because the statutes (Rev. Codes, secs. 5755, 5771) require a mortgagee, whose mortgage has been paid, to satisfy the same. This is not tenable. The sections just referred to require a mortgagee to satisfy the mortgage only when the debt or obligation thereby secured has been paid or performed; as the debt secured by this mortgage was not paid by the deposit, but the right to collect it was thereby vested in the plaintiff, these sections have no application.

The judgment appealed from is reversed and the cause is remanded, with directions to overrule the demurrer.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

Rehearing denied March 31, 1916.

PIERCE, RESPONDENT, v. CHICAGO, MILWAUKEE &  
PUGET SOUND RY. CO., APPELLANT.

(No. 3,592.)

(Submitted February 9, 1916. Decided March 3, 1916.)

[156 Pac. 127.]

*Public Lands—Conveyance Before Patent—Railroads—Rights of  
Way—Cancellation of Entry—Effect on Title.*

**Public Lands—Effect of Entry.**

1. So long as there is an existing entry of record, valid on its face, the land covered by it must be regarded as withdrawn from the public domain, and title to it cannot be initiated by a new entry or otherwise.

**Same—Patent—Title Relates to What Date.**

2. Title to public lands acquired by an entryman through patent relates to the date of his entry.

**Same—Entry—Cancellation—Conveyance to Railroad Before Patent—Title Acquired.**

3. Prior to the cancellation of an entry on public land, defendant railway company had obtained a quitclaim deed to a strip thereof for right of way purposes from the entryman, filed a map of definite location of its line in the local land office, which was approved by the Secretary of the Interior, and constructed its road. After the cancellation, another person entered the land and secured patent. *Held*, in an action by the second entryman, that the railway company acquired title to the right of way strip, good as against plaintiff.

[As to right of entryman to notice and hearing before cancellation of entry, see note in 75 Am. St. Rep. 880.]

*Appeal from District Court, Missoula County; B. Lee McCulloch, Judge.*

ACTION by Frank J. Pierce against the Chicago, Milwaukee & Puget Sound Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, with directions to dismiss.

Cause submitted on briefs of Counsel.

Mr. Henry C. Stiff, for Appellant; Mr. H. H. Field, of Counsel.

Plaintiff cannot recover for the value of the timber taken, or for the land included within the right of way, or for damages to timber or land not taken, because at the time these acts were

committed he did not have title to the land. (*Williams v. Southern Pac. R. Co.*, 150 Cal. 624, 89 Pac. 599; *St. Louis & S. F. R. Co. v. Stephenson*, 43 Okl. 676, 144 Pac. 387.) Damages resulting from appropriation of a right of way, and the construction of a railroad thereon, belong to the owner of the land at the time of such acts, and do not pass by a sale or conveyance to the vendee. Hence, if the acts complained of were not authorized, the right of action was in the United States, and did not pass to the plaintiff under his entry and patent. (*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 10, 39 L. Ed. 873, 15 Sup. Ct. Rep. 756; *Eastern Oregon Land Co. v. Des Chutes R. Co.*, 213 Fed. 897, 901; *St. Louis & S. F. R. R. Co. v. Stephenson*, 43 Okl. 676, 144 Pac. 387, 389; *Northern Pac. Ry. Co. v. Murray*, 87 Fed. 648, 31 C. C. A. 183.)

Defendant had title to the right of way under the Act of Congress approved March 3, 1875, either by (1) actual construction, or (2) by approval of its map and its relation back to a time prior to plaintiff's entry. (See *Jamestown & N. R. R. Co. v. Jones*, 177 U. S. 125, 44 L. Ed. 698, 20 Sup. Ct. Rep. 568; *Northern Pac. R. Co. v. Barlow*, 26 N. D. 159, 143 N. W. 903; *Johnson v. Spokane etc. R. Co.*, 25 Idaho, 389, 137 Pac. 894; *Oregon Short Line R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401; *Stalker v. Oregon S. L. R. Co.*, 225 U. S. 142, 56 L. Ed. 1027, 32 Sup. Ct. Rep. 636; *Minidoka & S. W. R. R. Co. v. United States*, 235 U. S. 211, 216, 59 L. Ed. 200, 35 Sup. Ct. Rep. 46; *Moss v. Douman*, 176 U. S. 413, 44 L. Ed. 526, 20 Sup. Ct. Rep. 429; *Hamilton v. Spokane etc. Ry. Co.*, 2 Idaho, 898, 3 Idaho, 164, 28 Pac. 408; *Alexander v. Kansas City etc. R. Co.*, 138 Mo. 464, 40 S. W. 104; *Bonner v. Rio Grande S. R. Co.*, 31 Colo. 446, 72 Pac. 1065; *Oregon Short Line R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.)

Plaintiff's cause of action is barred by the statute of limitations. The cause of action is upon an obligation, or liability, not founded upon an instrument in writing, other than a contract, account or promise. For a full discussion of such a cause of action, see *Boise Valley Construction Co. v. Kroeger*, 17

Idaho, 384, 105 Pac. 1070; reported, with an elaborate note, in 28 L. R. A. (n. s.) 968, and *Harvey v. M. C. & Ft. D. R. R. Co.*, 129 Iowa, 465, 113 Am. St. Rep. 483, 3 L. R. A. (n. s.) 973, 977, 105 N. W. 958. It is an action, such as would have been called "on the case," at common law, and is therefore governed by the three-years' statute. (*Daneri v. Southern Cal. R. Co.*, 122 Cal. 507, 55 Pac. 243.)

*Messrs. Hall & Whitlock, for Respondent.*

The appellant proceeds upon the theory that the wrong complained of in this case was completed prior to the plaintiff's entry and that damages resulting from the appropriation of a right of way belong to the owner of the land at the time of such acts and do not pass by a sale or conveyance to a vendee. This rule does not apply to cases where condemnation proceedings have been begun but not concluded prior to the sale of the land, and in such case the conveyance carries the damage to the vendee. (*Paducah etc. Ry. Co. v. Stovall*, 12 Heisk. (59 Tenn.) 1; *Virginia-Carolina Ry. Co. v. Booker*, 99 Va. 633, 39 S. E. 591; *Little Rock etc. Ry. Co. v. Allister*, 68 Ark. 600, 60 S. W. 953; *Northeastern Neb. Ry. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604; *Obst v. Covell*, 93 Minn. 30, 100 N. W. 650.) It is true in this case no condemnation proceedings were begun, and for that reason an action in this case takes the place of a condemnation proceeding; for when it is terminated and the damages are paid by the railroad company, title to the strip in question thereupon vests in the railroad, and if the general rule cited by the appellant does not apply in cases where a condemnation proceeding has been begun and not completed at the time of the transfer obviously, there is all the more reason for the general rule not applying in cases where, as in this one, the taking was in the first instance wrongful and without compensation and has continued to be so ever since. There are some cases which go even further than it is necessary for us to go to sustain our contention in this regard, and they are as follows: *Beal v. Durham etc. R. Co.*, 136 N. C. 298, 48 S. E. 674; *Fries v. Wheeling etc. R. R.*

Co., 56 Ohio St. 135, 46 N. E. 516; *Cincinnati etc. R. R. Co. v. Davis*, 10 Ohio Cir. Dec. 745, 19 Ohio C. C. 589.

We take it that the defendant in this case, as a grantee and successor in interest of the Montana company, is liable for the acts of the latter company in appropriating the land in question, regardless of when that appropriation occurred, provided there is no bar by virtue of the statute of limitations. (*Southern Ry. Co. v. Hood*, 126 Ala. 312, 85 Am. St. Rep. 32, 28 South. 662; *Midland R. R. Co. v. Galey*, 141 Ind. 483, 39 N. E. 940, 40 N. E. 801.)

In cases of railroad grants, the grant attaches only to the land that is public land at the time of the existence of an entry, and even though the same be subsequently canceled or abandoned, the land does not pass under the grant to the railroad. (See *United States v. Grand Rapids Co.*, 154 Fed. 131; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. Ed. 1122, 5 Sup. Ct. Rep. 566; *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 36 L. Ed. 806, 12 Sup. Ct. Rep. 856; *Whitney v. Taylor*, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. Rep. 796.)

The cases cited from the states by the appellant in this case are all cases where the person first filing has abandoned or relinquished or in some way lost his claim, none of them involving a case where there was a contest and where a preference right of a person in the position of the plaintiff in this case arose, which offers every reason for a distinction between those cases and this one. Appellant contends that the rule for which we contend does not apply to land claimed under the Act of 1875. It will be seen on consideration of the case of *Enid etc. R. R. Co. v. Kephart*, 19 Okl. 1, 91 Pac. 1049, that this precise question was passed upon and decided in accordance with our contention.

The statute of limitations applying is the ten year statute. In a recent South Dakota case, *Faulk v. Missouri etc. R. Co.*, 28 S. D. 1, Ann. Cas. 1913E, 1130, 132 N. W. 233, the ten year statute is held to apply. In Arkansas it is held that the adverse possession statute applies. (*Oregon v. Memphis etc. R. Co.*, 51

Ark. 235, 11 S. W. 96.) In Indiana the plaintiff is given two remedies, and if he selects one it is barred by the adverse possession statute, whereas if he takes the other, it is barred by the statute referring specifically to injury to property or damages for the detention thereof. (*Shortle v. Louisville etc. Ry. Co.*, 130 Ind. 505, 30 N. E. 639.) In Massachusetts there is a special statute requiring an action to be brought within one year where land is appropriated for railroad purposes. (*Partridge v. Inhabitants of Arlington*, 193 Mass. 530, 79 N. E. 812.) In Michigan the continuing trespass doctrine is adopted. (*Wood v. Michigan Air-line R. Co.*, 90 Mich. 212, 51 N. W. 265.) In Minnesota there is a special statute applying to such actions. (*Banse v. Clark*, 69 Minn. 53, 71 N. W. 819.) In Mississippi the statute with reference to adverse possession applies. (*Board of Levee Commrs. v. Dancy*, 65 Miss. 335, 3 South. 568.) The same rule applies in Missouri and in New Jersey. (*Doyle v. Kansas City etc. R. R.*, 113 Mo. 280, 20 S. W. 970; *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605.) And in Nebraska it was held that a statute limiting the time was unconstitutional. (*Kime v. Cass County*, 71 Neb. 677, 8 Ann. Cas. 853, 99 N. W. 546, 101 N. W. 2.) In New York neither the trespass statute nor the statute with reference to obligations arising out of contract applies. (*Clark v. Water Commissioners*, 148 N. Y. 1, 42 N. E. 414.) In Ohio a double remedy is provided as in Indiana, but the statute does not begin to run until an election is made. (*Fries v. Wheeling etc. Ry. Co.*, 56 Ohio St. 135, 46 N. E. 516.) In Texas the statute with reference to adverse possession applies. (*Chicago etc. Ry. Co. v. Johnson* (Tex. Civ.), 156 S. W. 253.) The state of Iowa applies the adverse possession statute. (*Hartley v. Keokuk etc. Ry. Co.*, 85 Iowa, 455, 52 N. W. 352.)

Notwithstanding the *Daneri Case* cited by the appellant, the California cases hold that in a case of a wrongful taking, as was this case, the statute applying is the statute referring to trespass upon real property, and the cases which lay down this

doctrine last referred to are cases of single wrongful acts, and their doctrine is not applicable to a case like the one at bar.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was commenced on May 16, 1912, for the recovery of damages alleged to have resulted to plaintiff from the appropriation and occupation by the defendant of a strip of land 200 feet in width and covering an area of twenty-eight acres, as a right of way for its railroad. The strip is a part of a tract of 160 acres situate in Missoula county, acquired by plaintiff by patent from the United States under a timber and stone entry made in compliance with the provisions of the federal laws applicable. The facts presenting the questions at issue are, briefly stated, as follows:

Prior to April 16, 1906, one Whitmore had filed in the United States land office at Missoula a homestead entry on the land. On that date the plaintiff instituted a contest of this entry, seeking to have it canceled, claiming a prior right to acquire patent. The contest was decided in his favor by the register and receiver on April 28, 1907, and the entry was ordered canceled. After the usual appeals the order became final, and on April 6, 1908, Whitmore relinquished his claim. On the same day the plaintiff tendered his filing, which was accepted, with the result that thereafter, upon the termination of contests instituted by other persons questioning plaintiff's right of entry, patent was issued to him. In the meantime the Chicago, Milwaukee & St. Paul Railway Company of Montana (hereafter referred to as the Montana Company) appropriated and occupied the strip for a right of way, having begun the work of clearing and construction in September, 1906. During the year 1907 (the exact date does not appear) Whitmore executed to the company a quitclaim deed to the strip for a consideration of \$1,000. On March 12, 1907, the company filed in the land office at Missoula a map, showing a survey and location of its line, which included the strip in controversy. This was approved by the secretary of the

interior on August 28, 1908. The construction of the roadbed was completed in September, 1907, and the laying of the rails in October, 1908. The defendant became the successor of the Montana Company by purchase on January 1, 1909. It then entered upon and occupied the right of way, and has since continued to do so. The damages for which recovery is sought include the value of the land so appropriated and occupied, and injury to adjoining land resulting from the construction and operation of the railroad. The questions of law arising upon these facts which were stipulated by counsel, the court determined in favor of the plaintiff, and submitted to the jury the question only what amount of damages the plaintiff was entitled to recover. The jury awarded him \$1,050, and judgment was entered for this sum and costs. The defendant has appealed from the judgment and an order denying its motion for a new trial.

No contention is made that the court committed any error in the ascertainment of the amount of damages. It is thus conceded that if the defendant is liable at all, the award made by the jury must stand. The theory of the case adopted by the court and counsel for the plaintiff was that the Montana Company did not acquire title by virtue of any of the occurrences prior to April 6, 1908, and hence that by its assumption of possession on January 1, 1909, under its conveyance from the Montana Company, the defendant became a trespasser, and liable to the plaintiff for all the damages it would have been liable for, had it sought to condemn the strip for a right of way in the first instance.

Counsel contends that the judgment should be reversed for three reasons: (1) That plaintiff did not have title at the time the acts complained of occurred; (2) that the defendant had title to the strip under the Act of Congress approved March 3, 1875, either by actual construction of its road, or by the filing of its map of definite location and the subsequent approval of it by the secretary of the interior; (3) that plaintiff's cause of action is barred by the limitation prescribed by subdivision 3 of section



6447 of the Revised Codes. The first two contentions, though stated as distinct propositions, in final analysis present the single inquiry: Did the Montana Company, by virtue of any of the occurrences prior to April 6, 1908, acquire title to the strip now occupied by the defendant? If it did, the plaintiff acquired title under his patent, subject to this prior right; and had this company continued to occupy the strip, it could not have been held liable to the plaintiff in any amount. Neither can defendant be held liable, for it is not questioned that it legally acquired all the rights of the Montana Company.

It will be noted that the date at which plaintiff acquired his patent does not appear. It is fair to assume that he acquired it subsequent to the completion of defendant's road. Whether this is so, however, is not important. Under the rule applicable, his title cannot relate to a date earlier than that of his entry. The [1] Land Department and the supreme court of the United States have always observed the rule that so long as there is an existing entry of record, valid on its face, the land covered by it must be regarded as withdrawn from the public domain; so that another citizen cannot initiate title to it by entry or otherwise. (*In re Cliff*, 3 L. D. 216; *Graham v. Hastings & D. R. R. Co.*, 1 L. D. 362; *In re Laird*, 13 L. D. 502; *McMichael v. Murphy*, 20 L. D. 147; *Witherspoon v. Duncan*, 4 Wall. (71 U. S.) 210, 18 L. Ed. 339; *Hastings & Dak. R. R. Co. v. Whitney*, 132 U. S. 357, 33 L. Ed. 363, 10 Sup. Ct. Rep. 112; *Hodges v. Colcord*, 193 U. S. 192, 48 L. Ed. 677, 24 Sup. Ct. Rep. 433; *McMichael v. Murphy*, 197 U. S. 304, 49 L. Ed. 766, 25 Sup. Ct. Rep. 460.)

In *Hastings & Dak. R. R. Co. v. Whitney*, *supra*, the court, after referring to its former decisions, said: "In the light of these decisions the almost uniform practice of the Department has been to regard land upon which an entry of record, valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale or grant until the original entry be canceled or declared forfeited, in which case the land reverts to the government as part

of the public domain, and becomes again subject to entry under the land laws." The fact that the entry is invalid for any reason does not aid the case of the adverse claimant. Speaking on this subject, the court later in the same case said: "But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

The underlying principle is that one person cannot initiate title to public land by invading an apparently valid existing right in another to the same land. (*Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732.) This rule is entirely in accord with the theory of the statute under which plaintiff established his right of entry. (Act Cong. May 14, 1880, c. 89, 21 U. S. Stats. 140, amended by Act Cong. July 26, 1892, c. 251, 27 U. S. Stats. 270, U. S. Comp. Stats. 1913, secs. 4536-4538.) The statute does not confer any right to the land covered by the canceled entry, but merely the right to acquire the title by making entry as required by the land laws; for, after providing that the register of the local land office shall give notice to the successful contestant of the result of the contest, it declares that he shall be "allowed thirty days from date of such notice to enter said lands." The extent of plaintiff's right was therefore a mere preference right of entry—a personal privilege which he might or might not exercise—granted to him in consideration of his conducting the contest of Whitmore's entry to a successful conclusion. (*Graham v. Great Falls W. P. & T. Co.*, 30 Mont. 393, 76 Pac. 808.) That his title subsequently acquired by his [2] patent relates to the date of his entry, however, must be conceded. This proposition is not controverted by the defendant.

It has always been the policy of the Congress to encourage the building of railroads in the western states, as is witnessed

[3] by the several grants of land to aid in their construction. To encourage those companies to which it had not made such grants, it enacted the statute invoked by the defendant, providing a means by which they might acquire rights of way over any portion of the public lands by filing in the local land office a map of definite location and securing the approval of the secretary of the interior. Prior to the passage of this Act (Act of March 3, 1875) and on March 3, 1873, Congress had passed another Act (17 U. S. Stats. 602, U. S. Rev. Stats. 2288, U. S. Comp. Stats. 1913, sec. 4535), authorizing any *bona fide* settler to convey "by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads," etc. This latter Act was amended by the Acts of March 3, 1891, Chapter 561, section 3 (26 U. S. Stats. 1097), and March 3, 1905, Chapter 1424 (33 U. S. Stats. 991), but not in any respect requiring notice here. Theretofore no such conveyance could be made, because the settler had no title, and because he was prohibited from alienating any portion of his claim before final proof. (U. S. Rev. Stats. 2291, U. S. Comp. Stats. 1913, sec. 4532.) From one point of view, this Act may be construed as expressive of an intention by Congress to enable the settler to make a *pro tanto* relinquishment of his claim, without forfeiting his right to patent, leaving the grantee to secure title under other provisions of the land laws, or by direct grant from the government. If this was its purpose, the defendant, by compliance with the Act of March 3, 1875, secured title as of the date at which it filed its map of definite location; for its right was initiated by the filing of the map showing its selection. (*Stalker v. Oregon Short Line R. R. Co.*, 225 U. S. 142, 56 L. Ed. 1027, 32 Sup. Ct. Rep. 636.) Under this view, the effect of the relinquishment was to restore the granted land *pro tanto* to the public domain, and at the same time to give the grantee a preference right to acquire it. Another view is that Congress intended by it to constitute the entryman the agent of the United States to convey the title to the grantee, as fully as if he had a patent. That this was perhaps the intention is shown by the fact that

all the purposes to be served by the conveyance are public, or *quasi* public, and it cannot be presumed that Congress overlooked the possibility that the entry of the settler might be canceled after contest or be abandoned, and the grantee left without protection from subsequent claimants. To illustrate: A grant is made of a small area for a community cemetery. If the grant is not effective to convey title, the subsequent cancellation or abandonment of the entry would restore the area to the public domain. The next entryman would be at liberty to respect or desecrate the resting place of the dead of the community, as his whim or caprice might prompt him. Such also would be the condition of the community school or church. So a railroad company would be left to his mercy, though it proceeded to construct its line under the justified belief that it had secured its right of way under its conveyance. The fact that the Act of March 3, 1875, provides for condemnation proceedings in similar cases does not preclude the notion that Congress intended, by the earlier Act to authorize the securing of the title to land for any of the purposes named, by treaty by the parties interested. But be this as it may, we are inclined to the view that the purpose of its enactment was to enable the entryman, for himself and the government, to convey the title. It is not important, however, which view is adopted. If Whitmore's grant amounted to nothing more than a relinquishment *pro tanto* of his right, so that the Montana Company could acquire the title from the government, it did so by complying with the Act of March 3, 1875, and also by the construction of its road. (*Stalker v. Oregon Short Line R. R. Co.*, *supra*; *Jamestown & N. R. R. Co. v. Jones*, 177 U. S. 125, 44 L. Ed. 698, 20 Sup. Ct. Rep. 568.) If, on the other hand, Whitmore was, under the circumstances, the authorized agent of the government to convey title, the Montana Company became fully vested with title at the time of the conveyance, and by virtue of it and the entry of plaintiff was made subject to its right. Either view brings this case within the spirit of the decision in *Minidoka & S. W. R. R. Co. v. United States*, 235 U. S. 211, 59 L. Ed. 200, 35 Sup. Ct. Rep.

46, in which, after considering the purpose of the Act and the amendments thereto, in connection with the legislation relating to irrigation districts, the court distinctly recognized the purpose of such conveyance to be to enable railroads to acquire effectively rights of way over lands entered as homesteads, but not yet patented.

Counsel for plaintiff rely with confidence upon the case of *Enid & Anadarko R. R. Co. v. Kephart*, 19 Okl. 1, 91 Pac. 1049. That case is distinguishable in its facts from this case, in that the question of the office of a conveyance to the railroad company from an entryman whose entry was *prima facie* valid was not therein involved or considered. It is not in point.

This disposition of the first two contentions of counsel renders it unnecessary to consider the third. The judgment and order are reversed, with directions to dismiss the action.

*Reversed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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CRITES ET AL., RESPONDENTS, v. SECURITY STATE BANK  
OF HAVRE, APPELLANT.

(No. 3,601.)

(Submitted February 14, 1916. Decided March 3, 1916.)

[155 Pac. 970.]

*Banks and Banking—Wrongful Dishonoring Checks—Damages  
—Presumptions—Excessive Verdict.*

**Banks and Banking—Wrongful Dishonoring Checks—Damages—Presumptions.**

1. In an action for damages for the wrongful dishonor of a trading customer's check, which accrued before the enactment of Chapter 90, Laws of 1915, limiting the bank's liability to damages actually proven, plaintiff was not required to show malice or present evidence of tangible loss, but could rely upon the presumption which allowed him substantial damages, temperately measured.

**Same—Excessive Verdict.**

2. Where a bank through mistake dishonored a trading customer's check, but upon discovery of the mistake notified the payee and paid it

with costs of protest, and plaintiff showed neither malice on the bank's part nor actual damage, a verdict for \$500 *held* excessive, and scaled to \$200.

[As to liability of bank for dishonoring check, see note in 80 Am. St. Rep. 865.]

*Appeal from District Court, Hill County, in the Twelfth Judicial District; John A. Matthews, Judge for the Fourteenth District, presiding.*

ACTION by W. D. Crites and J. R. Crites, copartners doing business as Crites & Crites, against the Security State Bank of Havre. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Modified and affirmed.

*Messrs. Cooper & Stephenson and Mr. Charles A. Rose, for Appellant, submitted a brief; Mr. Sam Stephenson argued the cause orally.*

*Mr. Victor R. Griggs, for Respondents, submitted a brief and argued the cause orally.*

In cases of this kind the courts make a distinction between an action brought by an ordinary depositor for the wrongful dishonor of his check and an action brought by a merchant or trader. In the former case the rule of law is that, in the absence of malice, oppression or bad motive, the refusal of a bank to honor its depositor's check, when such depositor has sufficient funds on deposit to meet the payment of the same, gives the depositor the right to recover only nominal damages unless he alleges and proves some special damage. But if the plaintiff is a trader or merchant, and his check is wrongfully dishonored, it will be presumed without further proof that substantial damage has been sustained. (5 R. C. L. 549; 5 Cyc. 535; *Lorick v. Palmetto Bank & T. Co.*, 74 S. C. 185, 7 Ann. Cas. 818, 54 S. E. 206; *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 15 L. R. A. 134, 28 N. E. 917; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 17 Am. St. Rep. 779, 18 Atl. 632; *James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 80 Am. St. Rep. 857, 51 L. R. A. 255, 58 S. W. 261; *First Nat. Bank v. Kansas Grain*

*Co.*, 60 Kan. 30, 55 Pac. 277; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190, 58 N. W. 84; *American Nat. Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759; *Siminoff v. Goodman & Co. Bank*, 18 Cal. App. 5, 121 Pac. 939; *Third National Bank v. Ober*, 178 Fed. 678, 102 C. C. A. 178.)

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiffs, trading copartners engaged in the retail meat business at Gildford, this state, drew a check upon the defendant bank for \$13.65 payable to the order of the Booth Fisheries Company of St. Paul. The payee, in due course of business, caused the check to be presented to the defendant bank for payment. The bank refused payment for that it did not have sufficient funds belonging to the plaintiffs to pay the check and caused the check to be protested and returned. The plaintiffs had ample funds with the bank to meet the check, and the dishonor and protest were due to a mistake of the bank in crediting a previous deposit by the plaintiffs to the wrong person. Being advised of its mistake, the bank notified the payee, caused the check to be sent back, and paid it with the costs of protest. Upon these facts, the plaintiffs claiming damages in the sum of \$1,000, the cause was presented to a jury, who awarded the plaintiffs \$500. The sufficiency of the evidence to justify this verdict, and some procedural rulings, are presented for review.

The cause of action accrued in March, 1913, and at that time [1] the liability of a bank for the wrongful dishonor of a customer's check was not limited, as it is now, to the damages actually proved; but, in the case of a trading customer, substantial damages, temperately measured, were to be presumed. (5 R. C. L. 548 *et seq.*, and cases cited.) The respondent stood upon this presumption, showing no malice and presenting no evidence of tangible loss. In these circumstances it cannot be said that the jurors did not exercise their best judgment in fixing the award, bereft, as they were, of the ordinary measures of

evaluation; and if their best judgment was exercised, then their verdict was not the result of passion and prejudice so as to warrant a new trial. But while this is so, we think the verdict [2] is excessive, measured by any applicable standards which may be suggested in matters of this kind. The plaintiffs were entitled to vindicate themselves from the possible imputation upon their solvency and good faith, and to be reimbursed for the cost of their effort in that behalf, but no more; and for this the sum of \$200 should suffice.

The procedural rulings assigned present no ground for reversal.

The order denying a new trial is affirmed, but the cause is remanded to the district court, with directions to modify the judgment so as to award plaintiffs the sum of \$200 as damages, with their costs, and as so modified to stand affirmed. Each party will pay his own costs upon these appeals.

*Modified and affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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DONOVAN ET AL., RESPONDENTS, v. JENKINS, APPELLANT.

(No. 3,607.)

(Submitted February 15, 1916. Decided March 4, 1916.)

[155 Pac. 972.]

*Attorneys—Contract of Employment—Construction—Fee—Payment in Money—"Costs and Charges."*

*Attorneys—Contract of Employment—Compensation—Time of Payment.*

1. Where attorneys were employed to foreclose a mortgage, the fee to be one-half of the amount recovered, they were entitled to their compensation only on the date their client's lien was on appeal finally determined to be superior to a claim to the property set up under a sheriff's deed.

*Same—Fees—Payment in Money.*

2. Attorneys who agreed to foreclose a mortgage for "a sum equal to one-half of the net profit" plaintiff might recover were entitled to



their compensation in money, and were not required to accept an interest in the property in lieu thereof.

Same—Contract of Employment—Fee—"Costs and Charges"—Deduction.

3. *Held*, that a clause of the contract referred to above, which provided that before making division of the sum recovered, plaintiffs' client might deduct any "costs or charges" paid by her, included court costs only, and not taxes, repairs and the like.

Same—Compensation—Deductions.

4. Rents collected by plaintiffs from tenants of the property pending foreclosure of the mortgage they were to secure under the contract above mentioned, were properly chargeable to them and deducted from their proportion of the amount recovered.

Same—Contract of Employment—Construction.

5. Where a mortgagee in her contract of employment with a firm of attorneys reserved in herself the right to employ another attorney to assist in a foreclosure proceeding, with the understanding that, in the event she exercised her option, such attorney should receive one-half of the sum otherwise to be paid to the firm, and the attorney was employed, the firm was entitled to only one-fourth of the recovery.

[As to contracts between attorney and client, see note in 83 Am. St. Rep. 159.]

*Appeal from District Court, Silver Bow County; John B. McClerman, Judge.*

ACTION by Louis P. Donovan and another against Mary Jenkins. From a judgment for plaintiffs and an order refusing her a new trial, defendant appeals. Modified and affirmed.

*Mr. W. D. Kyle* and *Mr. S. T. Hogevoil*, for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. Kyle* argued the cause orally.

*Mr. Peter Breen* and *Mr. Timothy F. Nolan*, for Respondents, submitted a brief; *Mr. Nolan* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In February, 1908, an instrument in writing was executed as follows:

"This agreement, made and entered into by and between Mary Jenkins, as party of the first part, and Donovan & Melzner, as parties of the second part, as follows: The said Mary Jenkins is to employ Donovan & Melzner as her attorneys to fore-

close a mortgage against Mrs. Celia Davidson and others, on these terms: The said attorneys are to receive no compensation for their services, except a sum equal to one-half of the net profit, or one-half of such a sum as Mary Jenkins may recover, and one-half of the attorney fees allowed by the court, but any costs or charges that Mary Jenkins has advanced shall be subtracted from the same and paid back to her, and thereafter she will allow the said attorneys the said one-half. Mary Jenkins agrees to pay the filing fees and service of summons and other necessary court expenses.

"It is understood and agreed, that any expenses incurred by the lawyers in going to Helena and other places are not to be borne by Mary Jenkins. The only expenses to be paid by her are such actual cash money as may be necessary to pay out by order of the court.

"Mary Jenkins reserves to herself the right to engage the firm of Maury, Templeman & Hogevoll, or Maury, or Templeman, or Hogevoll, and when she so does the said firm of Donovan & Melzner is to allow them one-half of the sums otherwise payable to the firm of Donovan & Melzner.

"MARY JENKINS.

"MAURY, TEMPLEMAN & HOGEVOLL,

"DONOVAN & MELZNER."

Mrs. Jenkins exercised the right reserved to her and employed Mr. Hogevoll, mentioned in the contract, as her attorney, and he, with Donovan & Melzner, prepared the complaint in the foreclosure suit, prosecuted the suit to trial, secured a decree as against the mortgagor, had the property sold and purchased by Mrs. Jenkins. Carrie May Carroll claimed an interest in the property and was made a defendant. The history of her claim and the controversy over it will be found recited at length in *Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064, and need not be repeated. A second trial as against the Carroll claim was had and a decree rendered which established the priority of the Jenkins mortgage. Defendant Carroll attempted a second appeal, but the appeal was dismissed. (*Jenkins v. Carroll*, 46

Mont. 607, 131 Pac. 1196.) The present action was brought by Donovan & Melzner to recover from Mrs. Jenkins the attorney's fee to which they deemed themselves entitled under the contract above. The only questions of consequence arise over the proper construction of that instrument. Unfortunately the meaning of its obscure phrases cannot be determined with mathematical precision.

1. The date upon which plaintiffs were entitled to their fee is of passing importance only. It determines the time from which [1] interest upon their award is to be computed. We think the trial court fixed that date correctly as the time when the Jenkins mortgage was finally determined to be superior to the Carroll claim. Had the Carroll claim been adjudged superior, Mrs. Jenkins would not have realized anything from the foreclosure suit, and consequently plaintiffs would not have been entitled to anything. They made their fee contingent upon Mrs. Jenkins realizing from the suit, and that contingency became a certainty only when the Carroll claim was finally defeated.

2. The trial court was clearly correct in holding that the [2] plaintiffs are entitled to their compensation in money and are not compelled to accept an interest in the property, the subject of the foreclosure suit. The word "sum," used in the contract to define the character of plaintiffs' compensation, refers to money, and not to an interest in real property. (7 Words & Phrases, 6784; *In re Hulburt*, 89 N. Y. 259; *United States v. Van Auken*, 96 U. S. 366, 24 L. Ed. 852.)

3. The "costs or charges" which Mrs. Jenkins is entitled to [3] deduct before any division is made with the attorneys refer to court costs, as held by the district court, and do not include taxes, repairs and like expenses. This seems to be made as plain as anything else in this somewhat remarkable agreement drafted by Mr. Hogevoll. The contract provides: "Mary Jenkins agrees to pay the filing fees and service of summons and other necessary court expenses." Again, after indicating certain traveling expenses and other like costs for which Mrs. Jenkins should not be held responsible, it provides, "The only

expenses to be paid by her are such actual cash money as may be necessary to pay out by order of the court," and the costs and charges to be deducted are those, and those only, for which Mrs. Jenkins is made liable under the terms of the contract itself.

4. The court was likewise correct in charging these plaintiffs [4] with \$225 collected by them in rental from Mrs. Jenkins' property. Their objection to being held for this amount, admittedly collected, is based upon a super-refined technicality too shadowy to be appreciated by us.

5. The principal question arises over the proportion of the amount to which plaintiffs are entitled. The trial court rightly gauged the amount of their recovery by the value of [5] the property at the time their interest accrued—October 28, 1912—but in our opinion erred in determining their proportion to be one-half of that value less the amount of costs paid out by defendant. The court evidently accepted the theory advanced by plaintiffs upon appeal, *viz.*, that they became liable under the contract to settle with HogevoU for whatever fee he would be entitled to claim, in the event Mrs. Jenkins exercised her right of election and employed him, and that their right to one-half is absolute in the first instance and subject only to the claim which HogevoU might make upon *them*. We are unable to appreciate this contention. The contract does not authorize Donovan & Melzner to employ HogevoU, but specifically reserves to Mrs. Jenkins the right to secure his services if she chose to do so. His employment created no contract relationship between him and Donovan & Melzner. He was employed by Mrs. Jenkins and could rightly look to her for his fee. The contract does fix the amount of his compensation in the event he should be employed, and designates the fund which otherwise would go to Donovan & Melzner exclusively, as the particular fund from which his fee should be derived; but it does not create any liability upon the part of Donovan & Melzner to pay him or authorize them to sue for or recover his proportional share. By exercising her right of election, Mrs. Jenkin made HogevoU

her attorney, and, if the services he rendered were satisfactory to her, no one can complain. The contract does not provide that he should do one-half of the work in the event he was employed; his counsel may have been deemed of sufficient value to warrant his retainer and to justify the liberal fee allowed him. These plaintiffs bound themselves to be satisfied with a one-fourth interest in the event HogevoU was employed, and, since he was employed, they must abide their contract.

The evidence is sufficient to justify the trial court's finding that the property was of the value of \$2,750. This amount, less \$187.85 costs and charges paid out by Mrs. Jenkins, divided by 4, gives the quotient \$640.54, and this sum, less \$225 chargeable to the plaintiffs for rents collected by them, is the amount for which judgment should have been rendered.

The order refusing defendant a new trial is affirmed. The cause is remanded, with directions to the district court to modify the judgment by reducing the amount thereof to \$415.54, with interest thereon from October 28, 1912, and for plaintiffs' costs. Appellant will recover one-half of her costs of appeal.

*Modified and affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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SLIFER, RESPONDENT, v. YORATH, APPELLANT.

(No. 3,606.)

(Submitted February 15, 1916. Decided March 6, 1916.)

[155 Pac. 1113.]

*False Imprisonment—Complaint—Sufficiency—Instructions—  
Refusal—Harmless Error—Burden of Proof.*

False Imprisonment—Complaint—Sufficiency.

1. A complaint in an action for false imprisonment, alleging a violation of plaintiff's personal liberty and that such violation was without legal justification, was sufficient on attack by general demurrer.

On burden of proof as to authority for arrest in action for false imprisonment, see note in 10 L. R. A. (n. s.) 303.

**Same—Punitive Damages—Instructions—Refusal—Harmless Error.**

2. Where no evidence tending to show malice on the part of a police officer in arresting plaintiff had been introduced, and the jury—judging from the amount of the verdict—must have refused to award exemplary damages, error in submitting instructions on the subject of punitive damages held harmless.

**Same—Credibility of Witnesses—Instructions.**

3. Reversal of a judgment will not be ordered for refusal of special instructions on the subject of the credibility of witnesses where a general one covering the subject had been given, and appellant did not point out wherein he was prejudiced by the refusal.

**Same—Burden of Proof.**

4. In an action for false imprisonment, the burden of proving justification for the arrest of the plaintiff by defendant police officer was upon the latter after the former had made out a *prima facie* case by testifying that while peaceably on his way home he was arrested without explanation or charge.

[As to the nature and elements of the action for false imprisonment, see note in 118 Am. St. Rep. 719.]

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Martin R. Slifer against William Yorath. From a judgment for plaintiff and an order denying his motion for new trial, defendant appeals. Affirmed.

*Messrs. Alexander Mackel, Mr. Wm. F. Davis and Mr. N. A. Rotering* submitted a brief; *Mr. John A. Groeneveld*, of Counsel, argued the cause orally.

No appearance in behalf of Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for false imprisonment. The plaintiff had verdict and judgment for \$100. The defendant has appealed from the judgment and an order denying his motion for a new trial.

Counsel assail the integrity of the judgment on the grounds that the complaint does not state facts sufficient to constitute a cause of action, that the evidence does not justify the verdict, and that prejudicial error was committed by the court in sub-

mitting certain instructions to the jury and refusing to submit others requested by the defendant.

About 3 o'clock on the morning of August 31, 1913, the plaintiff, who was employed as an engine oiler at the Grey Rock mine in Butte, was on his way from the mine, where he had been at work during the night, to his home in the southern part of the city. As he was passing down Main street he was arrested by the defendant, a police officer, searched, taken to the city jail, and there detained until about noon on the following day, when he was released on bail. A charge of vagrancy was lodged against him. Two days later, after a trial by the police magistrate, he was acquitted. After reciting these facts, the complaint alleges that at the time of the arrest the defendant had no knowledge that any crime had been committed by the plaintiff, and no reason or cause to believe that any crime had been committed by him, and that the act of the defendant was without authority of law or probable cause, and willful, oppressive and malicious. The defendant admits the arrest and alleges in justification that he made it as a police officer, in company with one Powell, another officer, upon information by one of several persons who were collected on Main street, that the plaintiff had drawn a loaded revolver and threatened to shoot the informant, and that plaintiff then had the revolver concealed about his person. He alleges in detail the circumstances of the arrest, charging the plaintiff with first attempting to escape, and then with an insolent refusal upon being questioned to give any information as to his name, residence or employment. He further alleges that he made the arrest verily believing the information given to him by his informant. The reply denies all the averments in justification, except that defendant was a police officer.

1. The complaint is ambiguous in its statements, rendering it somewhat doubtful whether the pleader intended to state a [1] cause of action for false imprisonment or for malicious prosecution. It was not attacked by special demurrer. The trial court upon general demurrer, and also upon objection to

the introduction of evidence, held that it states a cause of action for false imprisonment. This, we think, was correct. The statutes defines "false imprisonment" as "the unlawful violation of the personal liberty of another." (Rev. Codes, sec. 8324.) This provision defines the crime of false imprisonment as well as the civil wrong resulting from it. (*Kroeger v. Passmore*, 36 Mont. 504, 14 L. R. A. (n. s.) 988, 93 Pac. 805.) To make out a case for damages, the plaintiff must therefore allege a violation of his personal liberty, and that such violation was without legal justification. The complaint here meets both these requirements. It is therefore sufficient.

2. It is contended that the court erred in submitting to the [2] jury instructions under which they might consider the presence or absence of malice in order to determine whether they should allow exemplary damages, because there was no evidence tending to show the presence of malice. We do not think there was any error in this regard. Even so, the small award made by the jury, it would seem, must be accepted as conclusive that they refused to award exemplary damages, and hence, though it be conceded that there was no evidence in the case justifying the giving of the instructions, no prejudice was wrought by them. (*Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.)

Counsel for defendant devote most of their brief to the contention that the court erred in refusing special instructions requested as to the credibility of the witnesses. The court gave a general instruction upon the subject. Under the conditions disclosed in this case, we think this was sufficient. In any event counsel fail to point out wherein the refusal to give these instructions was anything more than a technical error. They do not attempt to point out wherein defendant suffered prejudice.

3. It is insisted that the averments in justification of the arrest were supported by the uncontradicted evidence of the defendant and Powell, and hence that the court erred in refusing to direct a verdict for the defendant. There is no merit



in this contention. Plaintiff's evidence was to the effect that [4] he was at the time of the arrest going peaceably and quietly to his home after finishing his work, and that he was arrested and searched without explanation or charge that he had committed a breach of the peace or wrong of any kind. A *prima facie* case was thus made. The burden was then cast upon the defendant to justify the arrest by adducing evidence tending to show that he had a reasonable cause to believe that the plaintiff had committed a felony. This he undertook to do by stating that he had been informed by a stranger that plaintiff had committed a felonious assault and had concealed upon his person a deadly weapon, and hence was engaged in committing another felony. Incidentally it appeared that the plaintiff had no weapon, that the informant was not detained to identify plaintiff, and that, instead of lodging a charge of felony against him, defendant charged him with vagrancy and had him put upon his trial for this offense. It was clearly the office of the jury to determine the weight of this evidence and to give credit accordingly. The court therefore did not err in refusing to direct a verdict.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

## CHILCOTT, RESPONDENT, v. REA ET AL., APPELLANTS.

(No. 3,612.)

(Submitted February 16, 1916. Decided March 7, 1916.)

[155 Pac. 1114.]

*Animals—Sheep—Trespassing—Fences—Instructions—Costs—Witnesses—Mileage.**Animals—Trespassing—Fences.*

1. To enable an owner of land to recover for damage done thereto by a band of sheep straying thereon while being moved across country, he need not show that the land was inclosed with a legal fence or that the trespass was the result of the willful and intentional act of the defendant.

*Same—Want of Legal Fence—Trespassing—Absence of Liability.*

2. Where animals which may lawfully run at large are turned loose on the public range or highway, and, following their own inclinations, invade premises not inclosed with a legal fence, no cause of action arises.

*Same—When Owner Liable.*

3. Where animals are held in herd, their movements being directed or controlled by their owner or his employees who know, or are chargeable with knowledge of, the boundaries of adjacent private property, and they invade such property through either the willful act or the negligence of either, such invasion is an actionable trespass, and the want of a legal fence is immaterial.

*Requested Instruction—Refusal, when not Error.*

4. Refusal of a requested instruction is not error where another covering the same matter is given.

*Costs—Witnesses—Mileage.*

5. The mileage of witnesses in civil actions allowed litigants by sections 7169 and 3182, Revised Codes, is limited to travel within the state.

[As to trespassing animals and the law in respect to them, see note in 81 Am. St. Rep. 446.]

*Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.*

ACTION by O. S. Chilcott against William Rea and others, copartners doing business under the firm name and style of Pryor Sheep Company. Judgment for plaintiff and defendants appeal from it and an order denying a new trial. Order affirmed; judgment modified and affirmed.

On lack of division fence as affecting liability for trespassing cattle, see note in 22 L. E. A. 60.

As to liability for trespass on unfenced land by livestock being driven along the highway, see note in 12 L. E. A. (n. s.) 912.

*Messrs. Johnston & Coleman*, for Appellants, submitted a brief; *Mr. Wm. M. Johnston* argued the cause orally.

The court erred in refusing to tax the costs of the witness *A. M. Goodrich*. It allowed the plaintiff fees for "hotel bill, sleeper, expenses and railroad fare" of Goodrich from Topeka, Kansas, to Billings. The witness was entitled only to his *per diem* of three dollars per day and mileage within the state of Montana. (Secs. 3182, 7169, Rev. Codes; 11 Cyc. 120; *Fish v. Farwell*, 33 Ill. App. 242; *Melvin v. Whiting*, 30 Mass. (13 Pick.) 184; *Howland v. Lenox*, 4 Johns. (N. Y.) 311; *Crawford v. Abraham*, 2 Or. 163; *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho, 418, 10 Ann. Cas. 395, 86 Pac. 41; *Whitehead v. Breckenridge*, 5 Ind. Ter. 133, 82 S. W. 698.)

The complaint fails to state a cause of action. In order to set up a cause of action in such a case, the complaint must either show that the lands were inclosed with a legal fence or that the trespass was the result of the willful, intentional act of the defendants; in short, such an action cannot be based upon ordinary negligence. (*Merritt v. Hill*, 104 Cal. 184, 37 Pac. 893; *Walker v. Bloomingcamp*, 34 Or. 391, 43 Pac. 175, 56 Pac. 809; *Hardman v. King*, 14 Wyo. 503, 85 Pac. 382; *Campbell v. Bridwell*, 5 Or. 311; *White v. Steele*, 5 Ala. App. 532, 59 South. 713; *Larkin v. Taylor*, 5 Kan. 433; see, also, *Chase v. Chase*, 15 Nev. 259, 262; *Moore v. Pierson* (Tex. Civ.), 93 S. W. 1007; *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093; *Wingrove v. Williams*, 6 Kan. App. 262, 51 Pac. 52; *Jones v. Blythe*, 33 Utah, 362, 93 Pac. 994; *Thomas v. Blythe*, 44 Utah, 1, 137 Pac. 396.)

*Mr. John G. Skinner* and *Messrs. Nichols & Wilson*, for Respondents, submitted a brief; *Mr. Carl J. Skinner* argued the cause orally.

The cases cited by appellant are all cases based upon willfully and intentionally herding cattle or sheep upon private property, in some cases over the objection of the owner. While in the case at bar we contend that the herders negligently permitted

the sheep to commit the trespass, we contend also that while the defendants had a right to the use of the highway for the purpose of moving their band of sheep to the Clawson ranch, they did not have the right to pasture their sheep on the highway. And we contend also that the plaintiff in this case was entitled to the grass and herbage growing on the highway adjacent to his land. If the cattle turned on the highway, for the purpose of grazing, escape into the adjoining close, the owner of the cattle cannot avail himself of the insufficiency of the fences, in excuse of the trespass. (*Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Montgomery v. Handy*, 63 Miss. 43; *Finley v. Bradley* (Tex. Civ.), 21 S. W. 609.) "Where custom requires fencing against cattle, not against sheep, one whose crops are injured by reason of the negligence of defendants' herder and sheep may recover therefor though his lands were not fenced against sheep. (*Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690.)"

The common-law rule prevails in this state. At common law every man was bound, at his peril, to confine his cattle to his own land, and if he failed to do so, he was liable for any trespass they committed on the lands of another. (*Indianapolis etc. R. Co. v. Harter*, 38 Ind. 557; *Wells v. Beal*, 9 Kan. 597; *Little v. Lathrop*, 5 Me. 356; *Richardson v. Milburn*, 11 Md. 340; *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262; *Gregg v. Gregg*, 55 Pa. St. 227; *Tonawanda R. R. Co. v. Munger*, 5 Denio (N. Y.), 255, 49 Am. Dec. 239; *Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755; *Bulpit v. Matthews*, 145 Ill. 345, 22 L. R. A. 55, 34 N. E. 525.) The cattle owner was generally liable for every trespass committed by his animals. (*Eames v. Salem etc. R. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Baltimore etc. Ry. Co. v. Lamborn*, 12 Md. 257; *Noyes v. Colby*, 30 N. H. 143; *Rossell v. Cottom*, 31 Pa. St. 525.) And it is immaterial whether the land trespassed upon is inclosed by a defective fence or no fence at all. (*Stewart v. Benninger*, 138 Pa. St. 437, 21 Atl. 159; *Harrison v. Brown*, 5 Wis. 27; *Tonawanda R. R. Co. v. Munger*, 5 Denio (N. Y.), 255, 49 Am. Dec. 239; *Wells v. Howell*, 19 Johns. (N. Y.) 385.) The question

of fencing is unimportant so far as the land owner is concerned, since it is the cattle owner's duty to keep his animals confined and prevent them from trespassing on the lands of another. The question of inclosing land is, therefore, seldom found to be treated in the discussion of the common-law doctrine. (*Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.) A land owner is under no obligation to fence his lands, even along the highway. (*Chambers v. Matthews*, 18 N. J. L. 368; *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.) And while it seems that a cattle owner, who is lawfully driving his cattle along the highway, is not subject to liability for an unavoidable and accidental trespass upon uninclosed lands bordering thereon (*Tonawanda R. R. Co. v. Munger*, 5 Denio (N. Y.), 255, 49 Am. Dec. 239; *Chambers v. Matthews*, 18 N. J. L. 368), yet the right to drive cattle over the highway gave no right to pasture such cattle, even in the highway, since by so doing the owner of the cattle was infringing upon the rights of the owner of the soil and freehold. Cattle have only the right of passage upon the highway, and if they are there for any other purpose, they are trespassing. (*Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.)

MR. JUSTICE SANNER delivered the opinion of the court.

The questions presented by these appeals are: (1) Sufficiency of the complaint; (2) sufficiency of the evidence; (3) the propriety of certain rulings in the admission of evidence, in the giving of plaintiff's offered instruction numbered 1, and in the refusal of defendants' offered instructions 3, 4, 6, 7, 8 and 11; (4) the allowance of a certain item of costs.

1. The complaint alleges ownership in the plaintiff of certain land, a portion of which had been reserved for pasture and upon five acres of which he had growing 100,000 young orchard trees; that defendants are sheepmen; that on a certain day "the defendants were moving a large band of sheep across the country and in the vicinity of plaintiff's said land, and while so doing, and while said sheep were under their control, they negligently

permitted said sheep to roam over and upon plaintiff's land and to trespass thereon," in consequence of which plaintiff's pasture was consumed and 50,000 of his orchard trees were destroyed, to his damage in the sum of \$7,570. The contention is that [1] no right to recover for depredations of this sort can be based upon ordinary negligence, but "the complaint must either show that the lands were inclosed with a legal fence, or that the trespass was the result of the willful, intentional act of the defendants." We cannot assent to this. The right to restrain or recover for trespasses committed under the circumstances pleaded in the present complaint is recognized in *Herrin v. Sieben*, 46 Mont. 226, 127 Pac. 323, and cases there cited, as well as by the supreme court of the United States in *Lazarus v. Phelps*, 152 U. S. 81, 38 L. Ed. 363, 14 Sup. Ct. Rep. 477, and *Light v. United States*, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485.

2. The answer denies the negligence alleged, admits that some sheep belonging to defendants strayed upon the plaintiff's land, and pleads affirmatively that said land was not inclosed with a legal fence, that said sheep "got beyond the control of the employees of the defendants" and were not driven on to said land or knowingly permitted to remain there by the defendants or by those in charge of said sheep. As regards the want of [2] a legal fence, the rule is that where animals which may lawfully run at large are turned loose upon the public range or highway, and, following their own inclinations, invade premises which are not inclosed with a legal fence, no cause of action arises from such invasion. We can also see that in the case of animals held in herd, where negligence is charged to the owner of such animals, and where it is claimed by him that the nonexistence of a legal fence was a factor in the control by him of such animals, the absence of a fence or its nonlegal character might be material upon the question of his negligence; [3] but where animals are held in herd, their movements being directed or controlled by their owner or his employees who know, or are chargeable with knowledge of, the boundaries of adjacent

private property, and they invade such property through either the willful act or the negligence of their owner or his employees, such invasion is an actionable trespass, and the want of a legal fence is not material. In the present case no claim is made that the nonlegal character of the fence had anything to do with the control of the sheep, and there is no testimony to justify the inference that they did in fact get beyond control. The only question upon the evidence, therefore, is whether the defendants' negligence was *prima facie* established by the plaintiff.

Briefly stated, the case made is as follows: On the day in question, the defendants' sheep, to the number of about 5,000, in charge of two herders and accompanied by a foreman and some dogs were being driven to a place called Clawson's ranch, which adjoins the land of plaintiff. They had been on the way without feed since morning, but there was feed for them at Clawson's ranch. They were traveling a lane from which the plaintiff's land was separated by a three-wire fence. This land consisted of a pasture within which, separately inclosed by a two-wire fence, was a five-acre nursery tract upon which about 100,000 apple trees were growing. When the sheep were within about a half mile of their destination, darkness fell, and the foreman, deeming it impossible to drive them farther, ordered them bedded down in the lane, making no provisions for feeding them there. He then left without waiting to see if his orders were carried out, and spent the night at Clawson's. The next morning it was ascertained that the sheep had passed over the plaintiff's land, eaten the pasture, and destroyed the greater portion of the nursery. The physical evidences upon the ground indicated, not that a portion of the sheep had strayed, but that the whole band had left the lane and gone across the plaintiff's land. One witness says the nursery looked as if they had been bedded there, and they were seen on the plaintiff's land next morning being driven by the herders toward the feeding ground at Clawson's. The foreman being advised by one of his subordinates of what had occurred, expressed regret, saying that he did not know that any nursery stock was there.

The herders did not testify either in person or by deposition. We think this was sufficient, *prima facie*, to sustain the charge of negligence. It tends to show that the sheep were at least permitted to proceed as they did; and, since the precautions taken to leave them in charge of two herders and some dogs were presumably sufficient with diligence to control the band, the passage of the sheep across the plaintiff's land and his consequent damage must be attributed either to the willful act or the lack of diligence on the part of defendants' agents. As to the amount of damage, the evidence was conflicting; the verdict, however, is well within the range of even a moderate compromise between the extreme views expressed by the witnesses upon this subject.

3. We find no reversible error in the rulings complained of touching the admission of evidence. The propriety of the court's instruction numbered 1 and of the refusal of defendants' offered instructions numbered 3 and 4 follows from what is said above. Offered instructions numbered 6 and 7, so far as correct, were fairly covered. Offered instruction No. 11 is incorrect in point of fact. As to offered instruction No. 8, the court cannot be put in error for its refusal in view of what is [4] said in *State v. Penna*, 35 Mont. 535, 545, 90 Pac. 787, and in view of the fact that it was covered by given instruction No. 7. We may remark, however, that this instruction No. 7 given at the instance of defendants is incorrect and has been repeatedly condemned.

4. Among the costs allowed to the plaintiff is an item of \$67.70 [5] for mileage of a witness who came to Billings from Topeka, Kansas, to testify. The record shows that he came by way of Chicago, Burlington & Quincy Railway, which is the most direct route, and which leaves the state at a point 105 miles from Billings. The claim is that this mileage should have been reduced to \$21, without any allowance for "hotel bill, sleeper, expenses and railroad fare." We think this is correct. The only costs allowed the successful litigant on account of witnesses are their "legal fees, including mileage" (Rev. Codes,



sec. 7169), and these are: For each day of attendance, \$3; for mileage in traveling to and from the place of trial, 10 cents per mile. (Rev. Codes, sec. 3182.) While section 3182 itself expresses no restrictions, and while the authorities are in conflict as to whether in civil actions mileage is allowable beyond the state line, we are nevertheless convinced that since recoverable costs are always limited to such as are necessarily incurred, and since the process of this state has no validity beyond its boundaries, and since ample provisions exist for taking the depositions of witnesses who reside without the state, the mileage allowable in civil actions as contemplated by the sections above referred to is mileage within the state. (11 Cyc. 120; 7 Ann. Cas. 164.)

The order appealed from is affirmed and the cause is remanded to the district court, with directions to correct the judgment by reducing the mileage allowed the witness Goodrich to \$21, and as so modified the judgment will stand affirmed.

*Modified and affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

**CASES DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**AT THE**  
**MARCH TERM, 1916.**

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**THE HON. THEODORE BRANTLY, Chief Justice.**

**THE HON. SYDNEY SANNER,**  
**THE HON. WILLIAM L. HOLLOWAY,** } **Associate Justices.**

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**MCDONALD, RESPONDENT, v. KLENZE, APPELLANT.**

(No. 3,614.)

(Submitted February 17, 1916. Decided March 9, 1916.)

[157 Pac. 175.]

***Promissory Notes — Evidence — Admissibility — Compromise —  
Fraud—Pleadings—Conclusions—Verdicts—Responsiveness to  
Issues.***

**Promissory Notes—Verdict—Responsiveness to Issues.**

1. In an action to recover on two promissory notes, the defense to one of which was payment, and want of consideration as to the other, a general verdict in a lump sum, *held* to have been responsive to both issues.

**Same—Verdict—Finding in Favor of Appellant—Right to Complain.**

2. Where the jury in an action on promissory notes awarded plaintiff much less than they might have done, defendant was not in a position to complain that under the pleadings and evidence plaintiff should either have recovered the whole amount sued for or nothing, and hence that the verdict must have been reached by a compromise and should not be allowed to stand.

**Same—Fraud—Pleadings—Conclusions.**

3. An allegation in answer to the complaint in an action on a promissory note that its date had been fraudulently changed by plaintiff was a mere conclusion, and insufficient to tender issue as to an intentional, material alteration precluding recovery under section 5069, Revised Codes.

**Same—Mistake in Execution—Evidence—Admissibility.**

4. Evidence by plaintiff that a note sued on was inadvertently dated "1904" instead of "1905" because, it being at the beginning of the new year, he had not yet become accustomed to writing the new date, was admissible, where the answer was insufficient to tender issue as to an intentional material alteration by plaintiff.

**Same—Compromise—Tender of Payment—Evidence—Admissibility.**

5. It is not error to admit evidence, in a suit on a note, that defendant offered, after suit was brought, to pay same by transfer of stocks and bonds, where it was not clear whether the offer was intended as a compromise or tender of payment, and the court instructed the jury to determine what defendant's purpose was in making the offer, and directed them to disregard the evidence if they reached the conclusion that the offer was intended as a compromise by defendant for the purpose of buying his peace.

[As to effect of tendering payment as satisfaction, see note in 100 Am. St. Rep. 453.]

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

Action by Alex McDonald against H. G. Klenze. From a judgment for plaintiff, defendant appeals. Affirmed.

*Messrs. Maury, Templeman & Davies*, for Appellant, submitted a brief; *Mr. H. L. Maury* argued the cause orally.

*Mr. J. L. Wines* and *Mr. T. J. Harrington* for Respondent, submitted a brief; *Mr. Wines* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to recover the principal sums and interest alleged to be due on two promissory notes executed to the plaintiff by the defendant. The first note is for the sum of \$500. It bears date January 4, 1904, and is payable one month after date, with interest at the rate of two per cent per month, payable monthly until the principal sum is paid. It stipulates for an attorney fee to be included in the cost of collection. The second

is for the sum of \$800, dated May 7, 1904, and payable at or before the expiration of two years thereafter, with interest at the rate of one per cent per month, payable quarterly. The complaint contains a count on each note in the ordinary form. It alleges that neither the principal sums, nor any part thereof, nor any interest, has been paid on either of the notes. The answer to the first count admits the execution of the note. It alleges that it was in fact executed on January 4, 1905; that it should bear that date, "and that the date thereof has been fraudulently changed by the plaintiff." As a second defense it is alleged that the principal and interest were fully paid on January 17, 1906, before the commencement of this action. To the second count the defense is that there never was any consideration for the note declared on therein, for that the same was delivered to one John R. Davenport, an agent for the plaintiff, upon the promise of Davenport that he would obtain for the defendant thereon the sum of \$800; that Davenport failed to obtain this or any other sum; that he never returned the note to defendant; and that thereafter he represented to the defendant that he had destroyed it and therefore could not return it. The reply omits reference to the alleged change of date in the first note, but denies all the other material allegations in the answer. The plaintiff had a general verdict for \$2,000, and judgment was entered accordingly. Defendant's motion for a new trial having been denied, he appealed from the judgment only.

The first contention made by counsel is that the judgment should be reversed because the verdict does not respond to all the issues made by the pleadings, and because, in the light of the evidence, it is the result of a compromise. A verdict may be general or special. The former is a pronouncement by the jury generally upon all the issues in favor of one of the parties, so that a judgment follows as of course in conformity with it. By the latter, the jury finds the facts only. The duty to render the proper judgment then devolves upon the court. (Rev. Codes, sec. 6757.) Under section 6758 the court may submit

special findings, but need not do so if in its opinion a general verdict will meet the requirements of the case.

The amount claimed by the plaintiff is the principal sum and [1] interest on both notes. The ultimate question which the jury were required to answer was, How much of this gross sum, if any, was due? Their answer was \$2,000. Necessarily this pronouncement determined the two subordinate inquiries, viz., whether the first note had been paid, and whether the second was supported by a consideration. Hence the verdict was a direct response to the issues involved. Counsel insist, however, that in view of the defenses interposed by the defendant, and [2] the evidence, the plaintiff ought either to have recovered the whole amount demanded or nothing; and hence that the verdict must have been the result of a compromise, and for this reason may not be allowed to stand. There is nothing in the record which explains definitely what prompted the jury to find as they did. It does appear, however, that the notes were executed for money borrowed by defendant from plaintiff through Davenport, who acted as agent for plaintiff in making loans for him. Davenport had full authority to act for the plaintiff, both in making the loans and in accepting repayment of them. Plaintiff had no personal knowledge of the transactions resulting in the execution of the notes. During the years 1903 and 1904 Davenport and defendant had been engaged in mining in Madison county, and the money represented by the notes was used in this enterprise. Davenport for some purpose paid the interest, or portions of it, from time to time as it fell due. What was the amount of these payments does not appear, beyond the indefinite statement by Davenport that he had paid the interest for four or five years. The evidence is exceedingly conflicting touching the dealings between Davenport and the defendant, particularly upon the question whether the first note had been paid as alleged in the answer, and whether defendant had been advanced any amount on the second. It would not serve any useful purpose to epitomize the evidence or discuss it. It is sufficient to say that if the jury had accepted the testimony

of the defendant, the verdict should have been in favor of the plaintiff for a small balance only of the first note; for, upon defendant's own admission, the payment claimed to have been made on that note was \$400 only. Having accepted Davenport's testimony, they necessarily resolved the issues of payment and want of consideration both in favor of the plaintiff, as is made evident from the amount found due. That they fixed \$2,000 as the amount is to be explained either upon the theory that they arbitrarily disallowed the interest in part because they thought the rate exorbitant, or else because they concluded that a large part of the interest had been paid by Davenport. However this was, the jury having found the issues for the plaintiff and made their award at a much less amount than they otherwise might, the result did not prejudice the defendant. If the plaintiff is willing to accept it, the defendant ought not to be heard to complain, because the advantage is *pro tanto* his. It is not infrequently the case that juries return such verdicts as we have here. If the party who suffers is willing to abide their action without complaint, the complaint of the other party that there has been a mistrial ought not to be heard with indulgence.

Before the first note was offered in evidence, Davenport was [3, 4] permitted to testify, over objection by defendant, that in writing the note at the time it was executed he inadvertently wrote "1904" instead of "1905," because, it being at the beginning of the new year, he had not yet become accustomed to writing the new date. This was all the evidence on the subject. The ruling is assigned as error. We think it was correct, for the reason that the allegation in the answer on this subject is a mere conclusion, and insufficient to tender issue as to an intentional, material alteration by plaintiff, precluding recovery under the statute. (Rev. Codes, sec. 5069.)

Plaintiff was permitted, over objection, to show that after this action was brought, defendant offered to pay both notes, by, [5] transferring to him, through Davenport, certain stocks and bonds. The evidence did not make it clear whether the offer was intended as a compromise of plaintiff's claim, or was

a tender of payment in that form without condition. The court instructed the jury to determine what defendant's purpose was in making the offer, and directed them to disregard the evidence if they reached the conclusion that the offer was intended as a compromise by defendant for the purpose of buying his peace. This was proper.

We have examined the several other contentions made by counsel, but find no merit in any of them. The judgment is affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied May 3, 1916.

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STONE, APPELLANT, v. MAYNARD, RESPONDENT.

(No. 3,617.)

(Submitted February 16, 1916. Decided March 9, 1916.)

[156 Pac. 418.]

*Appeal and Error—Conflict in Evidence—Verdict Conclusive.*

1. Where the evidence on the question at issue was conflicting, the verdict of the jury will not be disturbed on appeal.

*Appeal from District Court, Madison County; W. A. Clark, Judge.*

ACTION by A. L. Stone against Elbert A. Maynard and others. From the judgment and an order denying him a new trial, plaintiff appeals. Affirmed.

*Messrs. Lew. L. and E. J. Callaway, for Appellant, submitted a brief; the former argued the cause orally.*

The holder of a note is presumptively the owner, and his possession is presumptive evidence of title until rebutted by the

defendant. (*Whiteford v. Burckmijer*, 1 Gill (Md.), 127, 39 Am. Dec. 640; *Pomeroy's Code Remedies*, 128 *et seq.*; *Palmer v. Nassau Bank*, 78 Ill. 380; *New Orleans Canal & Banking Co. v. Bailey*, 18 La. Ann. 676; 2 Randolph on Commercial Paper, 707; Daniel on Negotiable Instruments, 1191, 1192b; Story on Promissory Notes, 381.) And until this presumption is overcome, plaintiff is a *bona fide* purchaser for value, has a right to sue, and is the real party in interest. (*Klein v. Buckner*, 30 La. Ann. 680; *Robertson v. Dunn*, 87 N. C. 191; *Hesser v. Doran*, 41 Iowa, 468; *Herrick v. Swomley*, 56 Md. 439; *McCann v. Lewis*, 9 Cal. 246.) As the defendant had no defense to the note in the hands of a *bona fide* holder, it was of no importance to him who owned the note at the time of the suit, provided he be not liable to a second suit founded on the same claim.

Mr. M. M. Duncan, for Respondent, submitted a brief and argued the cause orally.

Under section 5907, Revised Codes, the burden was on the plaintiff to show that he acquired the title to the note as holder in due course, and this, too, even though he produces testimony tending to show or, if true, showing the facts necessary to constitute him a holder in due course, and if the defendant offers no rebuttal to such testimony, it becomes a question for the jury and not one for the court. (*Gottstein v. Simmons*, 59 Wash. 178, 109 Pac. 596; *Leavitt v. Thurston*, 38 Utah, 351, 113 Pac. 77-79; *Union Investment Co. v. Rosenzweig*, 79 Wash. 112, 139 Pac. 874; *Richmond v. Tacoma R. & P. Co.*, 67 Wash. 444, 122 Pac. 351; *Barry v. Danielson*, 78 Wash. 453, 139 Pac. 223.)

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint alleges that on March 11, 1911, the respondent, Maynard, made and delivered to the defendants Grant & Howard his certain promissory note for \$1,500, payable in six months from its date, with interest and attorney's fees; that said note was thereafter, and on May 5, 1911, indorsed to the appellant, Stone; that the same has not been paid; wherefore judgment is



demanding accordingly. The answer, reply and evidence presented were such that the vital and decisive question to be determined by the jury, and the only one submitted to them, was whether the appellant, Stone, was the holder for value at the time the action was begun, to-wit, on September 28, 1912. Their finding was negative, and this, necessitating the judgment which was entered, is challenged as contrary to the evidence, as well as to the law given in the court's instructions. The respondent's position was that the State Bank of Dillon, and not the appellant, had the note, and that it was held by the bank for collection, and not as owner. We think the conclusion of the jury cannot be disturbed. The appellant is president, and at the time of the transaction involved was cashier, of the State Bank of Dillon. He testified in chief that he took the note as collateral to one executed and delivered by Grant & Howard for the balance of a pre-existing debt due to him, and the bank bookkeeper says the note does not appear on the bank records as it should if it belonged to the bank. Conceding the sufficiency of this *prima facie* to establish appellant as *bona fide* holder, the evidence elsewhere shows: That the note of Grant & Howard to which appellant claims the note in suit was taken as collateral runs to the State Bank of Dillon, but bears in lead pencil the indorsement, "State Bank of Dillon 8—30." That in September, 1911, two notices on the regular printed form of the State Bank of Dillon were sent to the respondent, stating, in substance, that the bank held the note in suit for collection and demanding payment thereof. That on September 30, 1911, a letter under the caption of the bank was sent to the respondent, signed "A. L. Stone, Cashier," wherein it is said: "We have had no response to our notices. \* \* \* We will place this note in the hands of an attorney. \* \* \* We trust that you will promptly remit us," etc. That on October 7, 1911, there was sent to the respondent by Edmond J. Callaway, counsel of record for this appellant, a letter to the effect that the State Bank of Dillon had placed said note in his hands. That on February 2, 1912, a letter under the caption of the bank was

sent to the respondent, signed "A. L. Stone, Cashier," wherein it is said: "We have been waiting for you to make remittance. \* \* \* We have not, however, had even a letter. \* \* \* The company have sent us on your certificate of stock. \* \* \* We trust you will pay," etc. That on February 9, 1912, the State Bank of Dillon brought suit on this note, the complaint alleging its corporate capacity and its ownership of the note in virtue of a sale and assignment to it by Grant & Howard on May 5, 1911, and being verified by the oath of the appellant as its cashier. That, respondent having, through his attorney, M. M. Duncan, caused a notice to be served upon Mr. Callaway, as attorney for the bank, of a demand for an inspection of its books and papers relative to said transaction, Mr. Callaway on April 23, 1912, wrote to Mr. Duncan waiving all objections to such inspection, but suggesting the futility of it, "as this was a 'side transaction.' Guess you know they do it occasionally. \* \* \* The matters do not themselves appear on the 'bank records' so called." That thereafter the bank's action was dismissed, and this suit was begun. That in the original complaint in this suit, which is verified by the appellant, it is alleged that Grant & Howard, on May 5, 1911, for a valuable consideration, sold and transferred this note to him, and he has ever since been the owner and holder thereof, but in the amended complaint in this action these allegations are omitted, their place being taken by the simple averment of an indorsement. It is quite true that explanations are offered for these inconsistencies, but the jury were not obliged to credit the explanations, and, if they did not, the evidence of appellant's *status* as a *bona fide* holder was in conflict. That conflict the jury could resolve either way, and, resolving it as they did against the appellant, he could not prevail.

An examination of the instructions discloses no merit in the contention that the verdict is against law.

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

## BOVEE, RESPONDENT, v. HELLAND, APPELLANT.

(No. 3,622.)

(Submitted February 18, 1916. Decided March 13, 1916.)

[156 Pac. 416.]

*Promissory Notes—Costs—Attorneys' Fees—Special Damages—Stipulations—Validity—Rules of Court.***Costs—Attorneys' Fees—Rules of Court.**

1. *Quære*: May the district court make a rule allowing attorneys' fees as costs in cases where they are not expressly authorized by statute or stipulated for by the parties?

**Same—Attorney's Fee—Statutory Provision Exclusive, When.**

2. Since section 7169, Revised Codes, which declares what items may be recovered as costs in ordinary actions is exclusive except so far as certain cases are taken out of its operation by special statutes, and does not mention an attorney's fee as one of such items, it is not recoverable as costs independently of rule of court (assuming that such a rule may be promulgated) or stipulation of parties.

**Same—Attorney's Fee—Stipulation—Special Damages.**

3. A stipulation in a contract for the payment of money permitting recovery of counsel fees in case action has to be brought to enforce collection is in the nature of a provision for special damages, recoverable, in addition to the principal sum claimed, upon appropriate allegation and proof.

**Same—Attorney's Fee—When Recoverable as Costs.**

4. Where a promissory note expressly provided that "attorneys' fees in addition to other costs" might be recovered in the event of suit, the fees were by such stipulation taken out of the category of special damages assessable by a jury, and placed among costs recoverable in addition to those awarded by statute.

[As to attorneys' fees as costs, see note in 79 Am. St. Rep. 178.]

*Appeal from District Court, Dawson County; C. C. Hurley, Judge.*

ACTION by Estella Bovee against S. H. Helland. Judgment for plaintiff and defendant appeals. Affirmed.

*Mr. Albert Anderson* and *Mr. Henri J. Haskell*, for Appellant, submitted a brief; *Mr. Anderson* argued the cause orally.

In an action at law, the court can impose no costs in the way of attorney's fee excepting such as are expressly provided for by statute. (11 Cyc. 104; *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315.) In a long line of authorities which is almost universal

the courts have held that the attorney's fee provided for in a note is a part of the debt which the maker of the note agrees to pay under certain conditions, and that the amount thereof can be recovered as special damage and not as costs. The authorities are collected in a note to the case of *Parks v. Granger*, 27 L. R. A. (n. s.) 157. (See, also, *De Jarnatt v. Marquez*, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45.) In the case of *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755, the court holds that the attorney's fee in an action on a promissory note providing for an attorney's fee must be passed upon at the trial of the action, the same as any other damages which the plaintiff seeks to recover.

*Mr. S. E. Felt*, for Respondent, submitted a brief and argued the cause orally.

The respondent contends, in the argument of this case, for two propositions: (1) Under the law of this state, attorneys' fees are in the nature of costs and are to be taxed by the court; (2) that appellant is estopped to claim that the attorneys' fees should have been determined by the jury and included in their verdict.

As to the first proposition: 11 Cyc. 105, reads as follows: "In jurisdictions, where stipulations for the payment of attorney's fees are considered valid, these fees are taxable as costs."

In *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 14 L. R. A. 588, 28 Pac. 291, after discussing the validity and effect of stipulation to pay attorneys' fees, in the event of suit, the court held that such fees are incidental to the main cause of action; are in the nature of costs and under the supervision and control of the court.

The appellant is estopped to argue that the attorneys' fees were a part of the plaintiff's main cause of action, and should have been submitted to the jury and included in their verdict. Certainly, the jury could not find attorneys' fees for the plaintiff without some evidence being introduced to support the finding. Since the defendant went into the trial of the case below,

merely admitting the execution of the notes and then asking for the right to open and close, he cannot now be heard to complain that the attorneys' fees should have been submitted to the jury and included in their verdict.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On November 18, 1913, the defendant executed and delivered to the plaintiff three promissory notes for \$400 each, due and payable, respectively, on the first days of January, February and March, 1914, with interest at the rate of 10 per cent per annum. Except as to their due dates, they are identical in form. The following is a copy of the first:

"\$400.00.

Glendive, Mont., November 18, 1913.

"January 1, 1914, after date, without grace, for value received, I or we jointly and severally promise to pay to the order of Estella Bovee, four hundred and no-100 dollars payable at the Exchange State Bank of Glendive, Glendive, Montana, with interest at 10 per cent. per annum from date until paid, and with attorney's fees in addition to other costs, should the holder be obliged to enforce payment of this note by law. The indorsers of this note waive demand, protest and notice of protest and guarantee payment; interest payable annually; if the interest is not punctually paid, it shall become a part of the principal and thereafter bear the same rate of interest as the principal.

"Due Jan. 1st, 1914.

"S. H. HELLAND."

On March 13, 1914, this action was brought to enforce payment, the complaint declaring upon the notes in separate counts. Each of the counts contains this allegation: "That the plaintiff has been obliged to enforce payment of the said promissory note by a suit at law, and to employ an attorney for that purpose; that the sum of \$50 is a reasonable fee for the services of the said attorney in this \* \* \* cause of action, which said sum this plaintiff has been obliged to pay. \* \* \* " The prayer

includes a demand that plaintiff be awarded counsel fees in the sum of \$150. The consideration for the notes was a quantity of hay sold and delivered by plaintiff to defendant in the stack. The defense interposed was that a mutual mistake had been made by the parties in the standard adopted to ascertain the quantity of hay, and that for this reason the notes were given for a much larger sum than was due the plaintiff. The answer does not deny the allegations relating to counsel fees, the only issue tried being that made by the reply to the affirmative defense. The jury returned a verdict for the amount of all the notes, principal and interest. The plaintiff included in her memorandum of costs an item of \$112.65 as a charge for counsel fees. Defendant moved that the item be stricken out. The court overruled the motion, ordered the item allowed, and it was incorporated in the judgment as a part of the costs of the action. The appeal is from the judgment and presents the single question whether the allowance was proper.

The rule has always prevailed in this jurisdiction that no costs may be allowed which are not expressly authorized by statute. [1, 2] (*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114; *Colusa Parrott M. & S. Co. v. Barnard*, 28 Mont. 11, 72 Pac. 45; *Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43.) Section 7169 of the Revised Codes declares what items may be recovered as costs in ordinary cases. It contains no mention of attorneys' fees. After designating what are necessary disbursements recoverable by the successful party, it concludes: "Any such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law."

Assuming that a district court may adopt a rule on the subject—a proposition which we do not decide—the allowance, if made, must be justified by the rule or by some express provision of law. Whether the district court of Dawson county has promulgated such a rule, the record does not disclose; and while there are provisions authorizing the allowance of counsel fees as costs in special cases—such as are referred to in sections 7165 and 7167

(section 7166 is invalid [*Mills v. Olsen*, 43 Mont. 129, 115 Pac. 33])—these sections are exceptional and do not enlarge the scope of section 7169. It is exclusive except so far as special cases are taken out of its operation by such provisions as sections 7165 and 7167. Therefore the allowance in question cannot be upheld upon the theory that it is authorized by rule or statute.

It is true that in the case of *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 14 L. R. A. 588, 28 Pac. 291, this court referred to counsel fees stipulated for in a promissory note, as being in the nature of costs and within the supervision and control of the court. The question whether or not such fees come within the purview of section 7169, however, was not before the court. The court was there considering the question of the validity of such a stipulation, and the remark referred to was merely incidental. By the great weight of authority, a [3] stipulation in a contract for the payment of money, allowing recovery of counsel fees in case action has to be brought to enforce collection, is regarded as a provision for special damages, recoverable, in addition to the principal sum claimed, upon appropriate allegation and proof. (*Parks v. Granger*, 96 Miss. 503, Ann. Cas. 1912B, 232, 27 L. R. A. (n. s.) 157, 51 South. 716; *De Jarnatt v. Marquez*, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45; *Morgan v. Kiser & Co.*, 105 Ga. 104, 31 S. E. 45; *Warder B. & G. Co. v. Raymond*, 7 S. D. 451, 64 N. W. 525; *Long v. Loughran*, 41 Iowa, 543.)

But notwithstanding these considerations, we think the allowance was properly made in this case, on the theory that the [4] parties intended that the fees should be a part of the costs, and therefore should be fixed by the court as such. The stipulation is for "attorney's fees in addition to other costs." While the language is not as clear and explicit as it might have been, yet it puts the fees in the category of costs by making them an addition to costs recoverable under the statute, thus taking them from the category of special damages to be assessed by the jury. In other words, the parties by their own stipulation made the fees an incident to the judgment. We know of no provision

of statute or rule of law founded upon considerations of public policy, which renders such a stipulation objectionable. On the contrary, the right of the parties to say what costs may be assessed upon the termination of the action, and thus control the power of the court to award them, has been expressly recognized. (*Dorr v. Steichen*, 18 Minn. 26 (Gil. 10); *People v. Fitchburg R. Co.*, 18 N. Y. Supp. 269; *Fish v. Coster*, 28 Hun (N. Y.), 64.)

It is true that, when the action was brought, counsel for plaintiff entertained the notion that the fees were recoverable as special damages. This is apparent from the allegation in the complaint quoted above. This, however, did not preclude the court from making a reasonable allowance as it did, counsel having abandoned his original theory and concluded to rely upon the stipulation.

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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ISBELL, RESPONDENT, v. SLETTE ET AL., APPELLANTS.

(No. 3,613.)

(Submitted February 16, 1916. Decided March 13, 1916.)

[155 Pac. 503.]

*Chattel Mortgages—Annual Crops—Filing—Constructive Notice—To Whom.*

*Chattel Mortgages—What may be Mortgaged.*

1. While, independently of statute, one cannot sell or mortgage personal property not in existence or in which he has no present interest, property which has a potential existence may be mortgaged or hypothecated.

*Same—Annual Crops—Extent of Lien.*

2. Annual crops have a potential existence even before they are planted, and the owner, or one rightfully in possession, of land has a mortgagable interest in the crops thereafter to be planted thereon, tho



lien of such mortgage not attaching until they are planted, and being limited to the interest which the mortgagor has.

Same—Annual Crops—Nature of Transaction.

3. A mortgage of the character of the above, *held to be*, in effect, no more than an executory contract which may become executed when the crops are planted and the lien attaches, or defeated if for any reason the mortgagor violates faith and fails or refuses to plant the crops.

Same—Filing—Constructive Notice to Whom.

4. The purpose of filing a chattel mortgage being to protect *bona fide* creditors and subsequent purchasers and encumbrancers (Rev. Codes, sec. 5758), constructive notice is imparted by the act of filing to such only; hence a lessee who, without actual notice of a mortgage given by the owner of land upon future crops, took possession of it before seeding time, and thereafter planted and harvested the crops,—being neither creditor, purchaser nor encumbrancer,—was not chargeable with constructive notice of the existence of the mortgage.

[As to chattel mortgages and what they affect, see note in 137 Am. St. Rep. 472.]

*Appeal from District Court, Valley County; Frank N. Utter, Judge.*

ACTION by T. L. Isbell against K. O. Slette and J. J. Higgins. Judgment for plaintiffs; defendants appeal from it and an order denying them a new trial. Affirmed.

*Messrs. Norris, Hurd & McKellar*, for Appellants, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

That a valid chattel mortgage may be executed upon crops to be thereafter planted and grown seems to be supported by the decided weight of authority, under the provisions of statutes similar to the chattel mortgage statute of Montana. The rule is stated in the case of *Wilkerson v. Thorp*, 128 Cal. 221, 60 Pac. 681, as follows: "It has been long settled, and has now become an established rule of property in this state, that a valid mortgage may be made upon a crop to be raised after the execution of the mortgage. (*Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Lemon v. Wolff*, 121 Cal. 274, 53 Pac. 801; *Hall v. Glass*, 123 Cal. 500, 69 Am. St. Rep. 77, 56 Pac. 336.)" The rule established by the court in the case above cited from was first mentioned in the case of *Arques v. Wasson*, *supra*, and seems to have been followed in all of the California cases passing upon the same question since that time. The rule is stated in

Cobbe on Chattel Mortgages, section 384, as follows: "A mortgage of an unplanted crop or of other future produce of a farm made by one in lawful, undisputed possession of the land on which they were to be planted, whether as owner or lessee, is now generally regarded as good and valid at law, as well as in equity." The same rule is stated in 6 Cyc. 1046 and cases there cited as obtaining in most jurisdictions.

The lien of a chattel mortgage upon a crop to be thereafter grown is superior to the rights acquired by the lessee of land upon which the crop is grown, acquired after the execution and filing of the mortgage and prior to the planting of the crop. (*Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522; *Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401.)

*Mr. John L. Slattery* and *Mr. John M. Kline*, for Respondent, submitted a brief.

A mortgage only creates a lien. (*Demers v. Graham*, 36 Mont. 402, 122 Am. St. Rep. 384, 13 Ann. Cas. 97, 14 L. R. A. (n. s.) 431, 93 Pac. 268.) Until the property mortgaged comes into being, and the mortgagor acquires an interest therein, the mortgage is only an agreement to create a lien. (*Bidgood v. Monarch Elevator Co.*, 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561; *Butt v. Ellett*, 86 U. S. 544, 22 L. Ed. 183.)

Where a man gave a mortgage on crops to be grown, and the crops were grown by the mortgagor and his brother as tenants in common, upon intervention by the brother as claimant for a share of the crops in suit brought by the mortgagees for the crops, the court said: "The mortgage passed to the mortgagees no other or greater interest in the crops than resided in the mortgagor. It was his right and interest, only, he had capacity to convey." (*Keyser v. Maas*, 111 Ala. 390, 21 South. 346; see, also, *Woolsey v. Jones*, 84 Ala. 88, 4 South. 190; *Simmons v. Anderson*, 44 Minn. 487, 47 N. W. 52; *Christianson v. Nelson*, 76 Minn. 36, 78 N. W. 875; affirmed on rehearing, 79 N. W. 647; *Hogan v. Atlantic Elevator Co.* (1896), 66 Minn. 345, 69 N. W. 1; *Bouton v. Haggart*, 6 Dak. 32, 50 N. W. 197;

*Gammon v. Buel*, 86 Iowa, 754, 53 N. W. 340; *McMaster v. Emerson* (1899), 109 Iowa, 284, 80 N. W. 389.) The mortgage in *Norfleet v. Baker*, 131 N. C. 99, 42 S. E. 544, was of crops gathered by the mortgagor upon certain land. It was held that the lien of this mortgage could not extend to crops grown by a lessee of the mortgagor.

Not a case have we been able to find, with facts approximating the facts in this action, as authority for appellants' contention. Many directly support the theory of respondent. Briefly, that theory is: A mortgage upon a crop is a mortgage upon the crop of the mortgagor, and nothing more. From it follows that: (1) It is not a mortgage upon land; (2) it is not a mortgage upon a right or privilege; (3) it is not a mortgage upon the crop of anyone save the mortgagor; (4) its filing of record does not affect a lessee or purchaser of the land whose lease or purchase antedates the planting of the crop; (5) the mortgagor may lease, sell or otherwise dispose of the land.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On September 30, 1911, Geo. D. Isbell executed and delivered to the State Bank of Culbertson a chattel mortgage upon the crops to be planted and grown upon his homestead during the season of 1912, as security for a debt due one year thereafter. In November, 1912, the indebtedness not having been paid, the bank, acting through K. O. Slette and J. J. Higgins, its agents, took possession of certain wheat and flax which had been grown upon the Isbell homestead during the season of 1912. T. L. Isbell, a son of Geo. D. Isbell, made claim that in April, 1912, he leased the homestead from his father; that he furnished the seed, planted, raised and harvested the crops—including the grain in dispute—and that his father had no interest whatever in them. He brought this action in conversion and prevailed in the lower court.

Although defendants appealed from the order denying them a new trial, as well as from the judgment, they do not attack the

good faith of the transaction between Geo. D. and T. L. Isbell, or contend that the evidence does not sustain the plaintiff's version of that transaction. They content themselves with urging a single question, viz.: Does a chattel mortgage given by the owner of land upon all the crops thereafter to be seeded and grown upon the land during the ensuing crop season—and which chattel mortgage is duly executed and filed—impart constructive notice to one who leases the land thereafter, but before seeding time, so that the crops grown on the land by such lessee will be subject to the lien of the chattel mortgage? It is the contention of the appellants that the annual farm crops to which the mortgage referred had a potential existence in September, 1911, though not planted until the spring of 1912, and that Geo. D. Isbell, by virtue of his ownership and possession of the homestead at the time he executed the mortgage, had a mortgagable interest in such crops, and that the mortgage, duly executed and filed with the county clerk and recorder, was constructive notice to T. L. Isbell when he took over the land, and that any interest he may have acquired in the crops for 1912 was subject to the lien of the mortgage.

Independently of statute (sec. 5712, Rev. Codes), one cannot [1] sell or mortgage personal property not in existence or in which he has no present interest. (*Bernard v. Eaton*, 2 Cush. (Mass.) 303; *Farmers' L. & T. Co. v. Long Beach Imp. Co.*, 27 Hun, 89.) But it is quite generally held that property which has a *potential* existence may be mortgaged or hypothecated (*Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; 5 R. C. L. 405; 6 Cyc. 1045), and the same authorities hold that annual [2] crops have a potential existence even before they are planted, and that the owner or one rightfully in possession of land has a mortgagable interest in the crops thereafter to be planted on such land. (*Arques v. Wasson*, above; Jones on Chattel Mortgages, 5th ed., sec. 143; Cobbey on Chattel Mortgages, sec. 384; 6 Cyc. 1046.) It goes without saying that the lien of such a mortgage cannot attach until the crops come into existence—until they are planted—and the decided weight of

authority and the better reasoning limit the extent of the lien to the interest which the mortgagor then has. (Jones on Chattel Mortgages, sec. 143a; Cobbey on Chattel Mortgages, sec. 388.)

Speaking of a mortgage on crops thereafter to be planted, the supreme court of Iowa said: "While there was nothing upon which the mortgage could operate at the time of its execution, it did attach to the property when it came into existence."

[3] (*Wheeler v. Becker*, 68 Iowa, 723, 28 N. W. 40.) In our opinion, such a mortgage is in effect nothing more than an executory contract which may become executed when the crops are planted and the lien attaches, or defeated if for any reason the mortgagor violates faith and fails or refuses to plant the crops.

But appellants contend that this chattel mortgage, by reason [4] of its being filed with the county clerk and recorder, imparted constructive notice to T. L. Isbell, and therefore any interest which he acquired in the crops should be held to be subject to the mortgage lien, and *Pierce v. Langdon*, 2 Idaho, 878, 3 Idaho, 141, 28 Pac. 401, is cited in support of this view. We should be somewhat in doubt as to the extent to which the court intended to go, but in *Shields v. Ruddy*, 2 Idaho, 884, 3 Idaho, 148, 28 Pac. 405, the court elucidated to this extent: "We have already held in the case of *Pierce v. Langdon*, 28 Pac. 401 [decided at present term], that a chattel mortgage upon crops to be sown was valid, and, when duly recorded, was notice to all persons acquiring or claiming to have acquired rights in or to the mortgaged property through or under the mortgagor subsequent to the recording of the mortgage." In each of those cases actual fraud was the determining factor, and the observation above would seem to be merely *dictum*. It may be said in passing, that the statute in force when these cases arose and were decided, required chattel mortgages to be "recorded in like manner as grants of real property." (Sec. 3386, Rev. Stats. of Idaho, 1887.) Whether this fact entered into the court's determination does not appear.

Counsel likewise rely upon *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522, in which the facts were that one Pendergrast, rightfully in possession of land, about February 5, 1880, executed to Taylor & Co., a chattel mortgage upon the crop of cotton to be raised upon the land during that crop season. Pendergrast then entered into a contract with Kelley by which they were to farm the land as copartners. In May, Kelley and Pendergrast executed a chattel mortgage to Mayer & Co., upon the cotton crop to be raised by them that year. In a controversy between the two mortgagees, the court held that Taylor & Co.'s mortgage was prior in time and therefore superior in right, and that their mortgage extended to whatever interest Kelley had in the crop. Kelley was charged by the court with notice of the Taylor mortgage, though the record is barren of any intimation that actual notice was had. Under the laws of Alabama a chattel mortgage was required to be *recorded*, and the court must have held that the recorded instrument imparted constructive knowledge to a lessee of the land upon which the crops were to be grown.

In *Keyser v. Maas*, 111 Ala. 390, 21 South. 346, a contrary view appears to have been expressed, though no reference whatever to the earlier decision is made.

Assuming these cases to hold the view most favorable to appellants as contended, we are unable to adopt their conclusion. In this state a chattel mortgage is not recorded but merely filed with the county clerk and recorder. Sections 5757-5773, Revised Codes, in force when these transactions occurred, is one of the numerous statutes aimed at fraudulent conveyances. Section 5758 provided that a chattel mortgage should be void as against creditors of the mortgagor or subsequent purchasers or encumbrancers of the mortgaged property in good faith for value, unless (a) possession of the property was taken and retained by the mortgagee, or (b) the mortgage was made to contain the proper recital, was accompanied by the required affidavit, was duly acknowledged and filed with the proper officer. It will be observed that registration—filing—was made the equiva-

lent of "change of possession" and that the purpose of either of these required acts was to impart knowledge. (5 R. C. L. 409.) But knowledge to whom? Sometimes it is said loosely that an instrument duly filed or recorded under our recording laws imparts notice of its existence and contents to all the world; but this is an absurdity, as a moment's reflection upon the origin and history of such statutes will disclose. (24 Ency. of Law, 2d ed., 75 and 146.) As between mortgagor and mortgagee, the mortgage is just as valid and binding whether it be filed or whether it conform to any of the requirements of the statute. (*Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452.) The same rule prevails as between the mortgagor or mortgagee and a stranger. Indeed, the unfiled, informal chattel mortgage is perfectly valid as against everyone except (1) creditors of the mortgagee who seek to enforce their claims against the mortgaged property, or (2) subsequent purchasers or encumbrancers of the property in good faith for value (6 Cyc. 1056-1066), and since the purpose of filing a chattel mortgage is to protect only *bona fide* creditors, and subsequent purchasers or encumbrancers, the filing imparts notice only to such. (5 R. C. L. 413.)

In *Greer v. Newlands*, 70 Kan. 315, 109 Am. St. Rep. 424, 70 L. R. A. 554, 78 Pac. 835, the question at issue was the extent to which constructive notice is imparted by a chattel mortgage duly filed, under a statute like ours. The person sought to be charged was a factor, without actual notice of the chattel mortgage. The court said: "It has been enacted however (Gen. Stats. 1901, sec. 4244), that an unrecorded mortgage 'shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith.' The factor is neither a creditor of the mortgagor nor a subsequent purchaser or mortgagee, and therefore is not within the protection of the statute. As to him the mortgage is equally as effective, whether of record or not. (*Drumm etc. Co. v. First Nat. Bank*, 65 Kan. 746, 70 Pac. 874.) It follows that he is not affected with notice of the filing of the mortgage, for 'the record imparts constructive notice to such persons only as would have

been entitled to protection against the conveyance in case it had not been recorded.' (24 Am. & Eng. Ency. of Law, 2d ed., 146.)"

A chattel mortgage upon crops thereafter to be planted cannot operate as an encumbrance upon the land where the crops are to be grown, and therefore, in the present instance, Geo. D. Isbell, after the execution of this mortgage and before any crops were planted, might have sold his homestead to a third party, and the purchaser could not have been held bound by the mortgage, and a lessee is in no worse situation. This is the rule followed by the great weight of authority, and commends itself to our judgment. (*Simmons v. Anderson*, 44 Minn. 487, 47 N. W. 52; *McMaster v. Emerson*, 109 Iowa, 284, 80 N. W. 389; *Reeves & Co. v. Sheets*, 16 Okl. 342, 82 Pac. 487; *Jones on Chattel Mortgages*, 5th ed., sec. 143a.)

T. L. Isbell, as lessee of his father's homestead, did not fall within either of the groups mentioned in our statute. He was not a creditor seeking to enforce his claims against the mortgaged property, and he was not a purchaser or encumbrancer of the property. As against him, the chattel mortgage would have been just as valid if it had not been filed at all, and, by filing it, his situation was not altered in the least. The mortgage, though filed, did not impart constructive notice to him, and, since it is not contended that he had actual notice of its existence, he cannot be bound by it in any sense.

The judgment and order are affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.



ANACONDA COPPER MIN. CO., RESPONDENT, v. PILOT  
BUTTE MIN. CO., APPELLANT.

(No. 3,700.)

(Submitted September 30, 1915. Decided October 4, 1915.)

[156 Pac. 409.]

*Mines and Mining—Extralateral Rights—Original and Sec-  
ondary Veins—Common-law Rights—Injunction.*

**Mines and Mining—Extralateral Rights—Common-law Rights—Injunction  
*Pendente Lite.***

1. Plaintiff owned the Badger and Emily claims, the former being the older location, both *prima facie* entitled to extralateral rights. The Badger State (or south) vein [see Diagram 4] as well as the Emily (or north) vein passed through the west end-line of the Emily and through its south side-line, the former at B and the latter at A, dipping to the north and uniting 900 feet below the surface, and from the point of union the united vein so far departed from a perpendicular on its descent into the earth that on the 1800-foot Badger State level it passed beyond the Emily north side-line and into territory beneath the surface of the Pilot claim, belonging to defendant. *Held*, on appeal from an order enjoining defendant from mining upon the united vein beneath the surface of its claim between a plane drawn through the Emily west end-line and a plane drawn through the Badger State east end-line projected north indefinitely, that the Badger State claim, being the older location, was entitled to the entire vein from the point of union by virtue of section 2336, United States Revised Statutes; that below the point of union the rights of the Emily claim were terminated by the plane B-F; that the ore within so much of the triangle B-C-F as lies beneath the surface boundaries of the Pilot claim belongs to defendant by virtue of its common-law rights, and that therefore the injunction order was too broad. (See opinion on rehearing for modification.)

**Same—Extralateral Rights—Extent.**

2. The owner of a quartz lode mining claim asserting extralateral rights is entitled to only so much of the vein on its dip as he has apex within the surface boundaries of the claim.

**Same—Continuity of Right.**

3. One who seeks to follow a vein from the apex thereof within his lode mining claim, to ore beneath the surface of a claim adjoining, must have continuity of right.

**Same—Extralateral Rights—Trespass.**

4. The owner of a lode mining claim seeking to reach ore bodies underneath the location of another, by virtue of his right to follow extralaterally a vein apexing within his surface boundaries, cannot do so if, in order to accomplish his purpose, he must trespass upon intervening rights.

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On the question of veins intersecting or uniting, see note in 50 L. R. A. 209; the right to follow a vein or lode on its dip beyond the surface lines of the location is discussed in an extensive note in 53 L. R. A. 491; and generally on the location of a mining claim, see note in 7 L. R. A. (n. s.) 765, page 842 discussing surface area thereof.

**Same—Secondary Veins—Extralateral Rights.**

5. (On rehearing.) The owner of a lode mining claim, if entitled to extralateral rights, may claim such rights not only upon the discovery but also upon the secondary veins found within its surface lines, at least for so much thereof as apex therein, the rights as to secondary veins not being confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end-lines of the claim are the end-lines of all veins apexing within the surface boundaries, the bounding planes for extralateral rights on the secondary veins, though required to be drawn parallel to the end-lines, need not be coincident.

[As to mineral veins and the right to follow them beyond lines, see note in 58 Am. St. Rep. 285.]

*Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.*

ACTION by the Anaconda Copper Mining Company against the Pilot-Butte Mining Company. From an order granting an injunction *pendente lite*, defendant appeals. Remanded, with directions to modify order.

*Mr. John J. McHatton*, for Appellant, submitted a brief, as well as one in reply to that of Respondent, and argued the cause orally.

A consolidated ownership does not change rights. The Badger State owns the vein to the point of its crossing into that claim, to-wit, 100 feet southeasterly from the southwest corner of the Emily and 574 feet southeasterly from the northwest corner of the Badger State. Where its right ends the Emily right begins. Going from the west end-line of the Emily to the southeast, we meet the same point, the point where the Badger State's rights begin, and there the Emily rights cease. It must be evident that where one right begins the other ends. This being true, the Emily can have only 100 feet of length of the vein between the plane of its west end-line extended and a plane extended parallel thereto through this point.

The vein dips to the north. If the vein had happened to dip to the south, the rights of the two claims would be as we have indicated and beyond the contest of the plaintiff. When we come to consider end-line planes as limiting extralateral rights, the direction of the dip, whatever it may be, cannot enlarge the

rights acquired under the statutes of the United States. Where a vein passes through a side-line, the side-line becomes an end-line.

The end-line of a mining claim, either actual or projected, must remain the same. It is an established fact. The direction of the dip cannot change it. A drawn-in end-line has its place of location. In this case, where the vein begins to pass out of the Emily claim. A person can have no more of the vein on the dip than they have apex. (*King v. Amy & Silversmith Con. Min. Co.*, 9 Mont. 543, 24 Pac. 200.) In that case it is said where the vein departs fixes the point where the "line is to be drawn." The same is said by the supreme court of the United States in that case on appeal. (Lindley on Mines, sec. 589; *Gilpin v. Sierra Nevada etc. Co.*, 2 Idaho, 696, 23 Pac. 547-1014; *Stewart M. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.) The same is held in *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 30 L. R. A. 803, 42 Pac. 273. In that case the point of departure of the vein from the junior into a senior location is fixed as the point through which to draw the end-line. This case confirms all that was said by the court with reference to this subject in *King v. Amy & Silversmith Con. Min. Co.*, *supra*. The case cited in *Fitzgerald v. Clark*, amply supports the proposition that this point is the point where the right to the apex of the vein ceases in the junior location. Where the planes of the end-lines converge, it lessens the right as the vein comes down. (*Consolidated Wyoming G. M. Co. v. Champion M. Co.*, 63 Fed. 540; *Carson City G. & M. Co. v. North Star M. Co.*, 73 Fed. 597-602; affirmed by circuit court of appeals, 83 Fed. 658, 28 C. C. A. 333; *Central Eureka M. Co. v. East Central Eureka M. Co.*, 146 Cal. 147, 9 L. R. A. (n. s.) 940, 79 Pac. 834; affirmed, 204 U. S. 266, 51 L. Ed. 476, 27 Sup. Ct. Rep. 258.)

The intent of the Act of 1872 requiring parallel end-lines was to prevent the locator in following his vein downward acquiring a greater length underneath the surface than he had at the surface. (2 Lindley on Mines, 574, 575, citing the *Del Monte Case*, 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895;

*Doe v. Sanger*, 83 Cal. 203, 23 Pac. 365.) Mr. Lindley refers to the case of *Bullion, Beck & Champion Co. v. Eureka Hill M. Co.*, 5 Utah, 3, 11 Pac. 515, and says that the older location being awarded the vein on its dip, there was nothing left for the junior location, although the end-lines are projected at different angles from those of the senior claim. The decision of the circuit court of appeals in *Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co.*, 114 Fed. 417, 52 C. C. A. 219, is contrary to the foregoing. It is also contrary to, and not supported by, the decision in *St. Louis M. & M. Co. v. Montana Co.*, 104 Fed. 664, 56 L. R. A. 725, 44 C. C. A. 120, and, of course, contrary to the decision of the trial court from which it came. It is essentially contrary to the decision in *Lawson v. United States Min. Co.*, 207 U. S. 1, 52 L. Ed. 65, 28 Sup. Ct. Rep. 15. The question in the present case is not controlled by the decision of the circuit court of appeals above referred to. The fact is that the vein here being, according to plaintiff, a broad vein, enters on its footwall into the older, Badger State claim, at a distance of 574 feet from its north-west corner, and that going to the southeast it is bisected by the north side-line of the Badger and the south side-line of the Emily, which are coincident for a long distance, where it enters the Badger State entirely.

Now, the vein becomes the property of the Badger State claim both on its apex and dip from the point where the vein enters it. From that point it ceases to be the Emily vein. That is the point where the east end-line of the Emily must be drawn, otherwise there is no virtue or force in the cases. The apex belonging to the Badger State claim to that point, the Emily can have no greater length on the dip than it has from that point to its west end-line.

This court in its decision in the *Copper Trust Case, State ex rel. Anaconda C. M. Co. v. District Court*, 25 Mont. 504, 65 Pac. 1020, held that no right could be acquired through a prior right and also that the length of apex on the surface governed. This case is acknowledged by Mr. Lindley to be contrary to the Idaho cases and to the decision of the circuit court of appeals.

(2 Lindley, sec. 595, p. 1423.) It supports our contention as against the contention of the respondent and the *Viola Case*. The question is settled by the decision in this state.

The rights of a vein passing through an end-line and then through a side-line are thoroughly well determined. (See *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 30 L. R. A. 803, 52 Pac. 273; *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895; *Tyler Mining Co. v. Sweeney Mining Co.*, 54 Fed. 284, 4 C. C. A. 329; *Consolidated Wyoming Gold M. Co. v. Champion M. Co.*, 63 Fed. 540; *Tyler M. Co. v. Last Chance M. Co.*, 71 Fed. 848.)

*Messrs. L. O. Evans, W. B. Rodgers, D. Gay Stivers and D. M. Kelly*, for Respondent, submitted a brief; *Mr. Evans* argued the cause orally.

Appellant's contention that the locator and developer of a vein, which in its depth is found to unite with another vein belonging to an older location, loses his extralateral rights beyond the extralateral rights of the older claim upon the vein, has never been upheld or intimated to be correct by any court so far as we can discover. Such a case as that of the Emily, where the Emily vein was properly subject to location within that claim, there being the apex of a vein or veins answering the requirements of our mining law, would afford a much clearer case of extralateral rights, subject only to the rights of a senior location upon a vein joining with the Emily vein in depth, than if the Emily vein were a broad vein, the apex of which was divided with the Badger State claim, by the common side-line, as in that case, under the law, the Badger State would take the entire vein upon its dip between its end-lines, leaving the Emily only the surface of the portion of the apex lying within its lines; so that if, under our mining law, the locator of a junior claim, upon a divided apex, would have extralateral rights, only limited by the rights of the senior location, then in principle similar extralateral rights must be granted without question to the locator of a vein independent and separate from the surface to a point where it unites in depth with the vein of the older location.

That a junior claim has full extralateral rights after the rights of the senior claim have been satisfied in the case of a longitudinally bisected vein has been determined by a court of eminent authority upon our mining law. (*Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co.*, 114 Fed. 417, 52 C. C. A. 219.) Prior to the decision in this case, the court held in the case of *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 104 Fed. 664, 56 L. R. A. 725, 44 C. C. A. 120, a decision which was subsequently followed by the supreme court of the United States in *Lawson v. United States Mining Co.*, 207 U. S. 1, 52 L. Ed. 65, 28 Sup. Ct. Rep. 15, that where the apex of a vein was bisected in this manner, by a side-line, that the older location, as against the junior, took the entire vein between its end-line planes.

Previous to the decision of the circuit court of appeals in the *St. Louis Case*, there had been some divergence of opinion in the courts as to the extralateral rights of the respective claims under such circumstances. Judge Hallett in the *Hall-Equator Case* had held that no extralateral rights were obtained unless a locator included within his location the entire apex. The court of appeals of Colorado had made a similar holding. The supreme court of Utah, in the case referred to in appellant's brief, *Bullion-Beck etc. Co. v. Eureka Mining etc. Co.*, 5 Utah, 3, 11 Pac. 515, had held to the contrary, and in accordance with the decision of the court of appeals in the *St. Louis Case*.

Every point advanced by appellant's counsel in this case is answered adversely to appellant by the decision in the *San Carlos-Viola Case* (114 Fed. 417, 52 C. C. A. 219), and practically every contention suggested by appellant here was advanced by Judge Beatty, in his decision in the *San Carlos Case*, and logically met and overruled by the court of appeals. Excepting the decision of the lower court in this case, we have not been able to find any decision holding or even intimating that this decision is not correct. It is referred to, apparently with approval, in Lindley on Mines, third edition, section 583, and is followed and cited by the circuit court of appeals in later cases, viz.: *Empire State Co. v. Bunker Hill*

*Co.*, 121 Fed. 973, 58 C. C. A. 311, and *Last Chance Co. v. Bunker Hill Co.*, 131 Fed. 579, 66 C. C. A. 299, in both of which cases a review was denied by the supreme court of the United States. In its decision in the *Lawson Case*, which went merely to the extent of holding, as did the court of appeals in the *St. Louis Case*, that as against the junior location the senior location took the entire lode within the planes of its end-lines properly located, the supreme court of the United States cites this decision in the *San Carlos-Viola Case*.

The decision of the circuit court of appeals in the *San Carlos Case* was considered by Judge Marshall in the circuit court of the district of Utah in the case of *Wall v. United States Min. Co.*, decided September 4, 1905, where the controversy justified the application of a similar doctrine. Judge Marshall plainly conceded the correctness of the decision of the circuit court of appeals in the *San Carlos Case*. Judge Marshall there said:

"There is no reason to doubt the correctness of this latter decision."

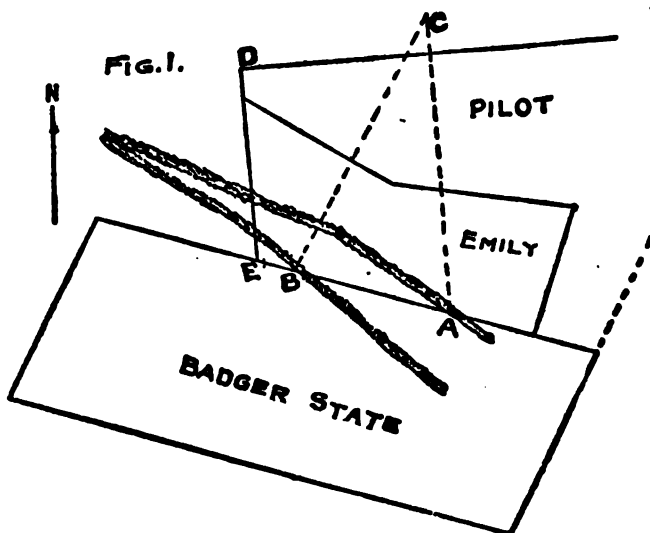
It is contended in counsel's brief that the court in the case of *Bullion-Beck etc. Co. v. Eureka Hill etc. Co.*, 5 Utah, 3, 11 Pac. 515, held that the older location took the entire vein and left nothing for the junior location, although its end-lines were projected at different angles from those of the senior claim. This decision of the Utah court shows that the question of the rights of the junior claim on the dip, beyond where the rights of the senior claim ceased, was not involved or discussed at all. The decision was simply to the effect that as against the junior claim, the senior took the entire vein.

Counsel claims that the decision of the lower court is in direct conflict with the decision of this court in the case of *State ex rel. Anaconda Copper Min. Co. v. District Court*, 25 Mont. 504, 65 Pac. 1020, known as the *Copper Trust Case*. There is no similarity whatever between the two cases. In that case only a small triangular piece of ground ten feet in width at its base and seventy-five feet long, between claims which had long been patented, was open to location. The extreme extent of apex

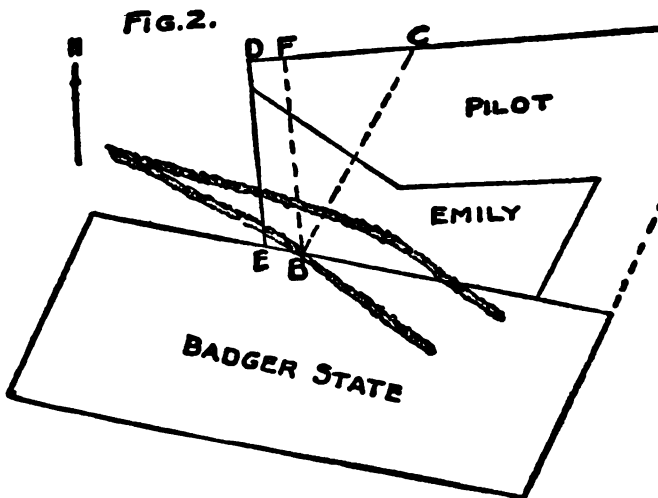
claimed for this fraction was less than seventy-five feet, and based upon a location upon this tract and another small triangular tract remote therefrom, which did not enter into the decision to any substantial extent, the locator of the Copper Trust claim claimed underground rights upon the vein, which in the extreme covered in length a portion of the vein at depth for about 1500 feet. This court simply held that underground rights could not be obtained without corresponding surface and apex rights, and that the extent of the apex within the ground open to location fixed the limit of length granted upon the vein upon its dip.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

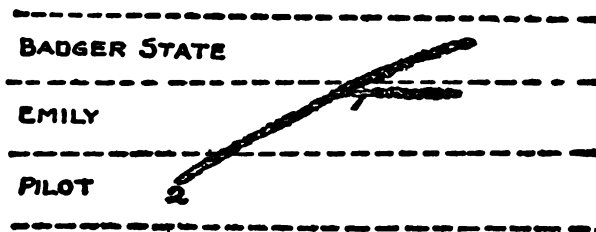
This appeal presents for review an order of the district court granting an injunction *pendente lite*. The plaintiff is the owner of the Badger State and Emily claims, and the defendant owns the Pilot claim to the north. The situation of these claims and the question propounded for solution are best illustrated by the subjoined diagrams, which are sufficiently accurate for all purposes of this appeal.







**FIG. 3.**



As between the Badger State and the Emily, the former is the senior location. Each of these claims was originally located so that it is entitled, *prima facie*, to extralateral rights. There is some controversy as to whether there is in fact one broad vein or at least two distinct veins; but the trial court found generally for the plaintiff, and for the purposes of this appeal we shall assume, without deciding, that plaintiff's theory of distinct veins is correct.

The south vein, hereafter referred to as the Badger State vein for convenience only, passes through the Emily west end-line

and through the south side-line into the Badger State at the point B. The north vein, which will be designated the Emily vein, likewise passes through the Emily west end-line and through the south side-line into the Badger State at A (Fig. 1). These veins dip to the north and about 900 feet below the surface unite on the dip, and from that point the one vein so far departs from a perpendicular on its descent into the earth that, in the neighborhood of the 1,800-foot Badger State level, it passes beyond the Emily north side-line and into territory beneath the Pilot surface. The trial court enjoined the defendant from mining upon this vein beneath the Pilot between a plane drawn through the Emily west end-line and a plane drawn through the Badger State east end-line projected north indefinitely. By eliminating all other questions which we deem inconsequential, we have for determination the single inquiry: Was the order justified?

The plaintiff does not attempt to defend the order in terms, but insists that if the planes as drawn were employed merely as a convenient means of describing the territory to be protected, and if the defendant is not injured thereby, the order should be affirmed, even though there cannot be any justification, from a technical point of view, for projecting the planes as was done in the order, and of the correctness of this there cannot be any question.

The first contention of plaintiff is that the Badger State is [1, 2] entitled to extralateral rights on the Badger State vein under the Pilot surface between a plane through the Badger State east end-line projected north indefinitely, and a plane parallel thereto drawn through point B, and for the purposes of this appeal defendant concedes this contention.

Plaintiff insists, further, that the Emily is entitled to extralateral rights on the Emily vein beneath the Pilot surface between a plane drawn through the Emily west end-line D, E, projected north indefinitely, and a plane parallel thereto drawn through A, C (Fig. 1). The defendant's theory is that the right of the Emily to follow the vein under the Pilot surface is

limited between a plane drawn through the Emily west end-line D, E, and a plane parallel thereto drawn through B, F (Fig. 2). Figure 1 illustrates the plaintiff's view, figure 2 the theory of defendant, and figure 3 is a cross-section showing the union of the two veins, and the dip of the consolidated vein. If the Emily rights be established in harmony with plaintiff's contention, then the defendant is not injured by the order as made. If, on the other hand, defendant's theory is correct, the order is too broad, for a triangle formed by lines drawn through B, C, F (Fig. 2) is not included within the extralateral rights of either of plaintiff's claims and should be exempted from the operation of the injunction, leaving the Pilot free to prosecute its mining operations within so much of the triangle as lies within its surface boundaries, upon the theory that the ores therein belong to it by virtue of its common-law rights.

It is claimed for the contention of the plaintiff that it is warranted by the express language of section 3 of the Act of May 10, 1872 (Chap. 152, 17 Stat. 91, U. S. Rev. Stats., sec. 2322), and by the construction given that statute by federal courts in cases presenting like questions. The effect of the statute invoked is that discovery upon a vein which cuts at least one of the parallel end-lines of a claim and has its apex within the surface lines of the claim extended downward vertically, gives to the locator exclusive possession of the surface and of all veins, lodes and ledges therein throughout their entire depth, although such veins, lodes or ledges so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such location.

It is immaterial to this discussion whether the Badger State vein, as we have denominated the south vein, is the discovery or a secondary vein in the Badger State claim, or whether the Emily discovery was upon the Emily vein, as we denominate the north vein. Upon the assumption that the Emily claim has within its surface boundaries 600 feet or more of the apex of the Emily vein, the language of the statute above is invoked to justify the Emily in claiming extralateral rights along that vein

for an equal number of feet beneath the Pilot surface below the 1,800-foot level, notwithstanding the union of the Badger State and Emily veins above the point where the Emily north side-line is crossed by the consolidated vein. If the provision of section 2322 above was the only applicable statute, the correctness of the plaintiff's position would afford reasonable ground for debate; but the history of our mining laws and the construction which we deem it necessary to give to the entire Act of May 10, 1872, remove the question presented upon this appeal from the realm of doubt.

The common law would give to each of these claims all ore bodies beneath its surface. The right which a locator has to follow his vein on its dip beneath the surface of another claim is purely of statutory origin. The statute is but the outgrowth of mining rules and regulations in force in California, Nevada and other western territory, before the Congress enacted the first statute in 1866; and these rules and regulations were largely the result of the application to existing conditions of the Spanish ordinances in force in Mexico, with possibly some ideas borrowed from the customs of the High Peak of Derbyshire and the laws of Prussia. They were enforced *ex necessitate* and received recognition from the courts and the Congress. As applied to quartz mining, they uniformly awarded to the locator a claim of a certain number of feet along the vein, with the right to follow the vein on its dip into the earth *ad libitum*. In recognition of the binding force of these regulations and as supplementary thereto, the Congress enacted the first Mining Code in 1866 (14 Stats. at Large, p. 251). Section 2 of that Act furnished a procedure for obtaining patent, and declared that when issued the patent should convey to the claim owner "such mine together with *the right to follow such vein or lode with its dips, angles and variations to any depth*, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." Section 4 repeats this language in substance. Nothing whatever is to be found in the Act or in the local rules and regulations, so far as our investigation

goes, as to the relative rights of each of two locators whose veins united on the dip beneath the earth's surface. When such a condition arose, it was necessary to make an equitable division of the vein at and below the point of union, or the right of one claimant had to yield to the paramount right of the other. The theory of a division of the vein never found favor with the miners or with the courts, but the maxim, "First in time is strongest in right," was applied in the absence of express statutory enactment to the contrary. When the Act of 1872 above was passed, the subject was placed beyond the pale of controversy, by crystallizing the maxim into statutory law. Section 2336, United States Revised Statutes, provides: "And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." If the early miner was led to believe that the right to follow his discovery vein on the dip between the planes of his end-lines was absolute, he was soon disabused of his illusion. If his vein dipped beneath his side-line into prior patented agricultural land, he discovered that his right was cut off and that the common law interposed to stay his mining operations. (*Amador Medean Gold Min. Co. v. South Spring Gold Min. Co.* (C. C.), 13 Sawy. 523, 36 Fed. 668.) If in pursuing his vein on the dip he came into contact with the asserted right of a prior locator on the same vein, the maxim "First in time is strongest in right" took from him that which he assumed to be his own and gave it to the older location." (*Tyler Min. Co. v. Sweeney*, 79 Fed. 277, 24 C. C. A. 578; *Tyler Min. Co. v. Last Chance Min. Co.* (C. C.), 71 Fed. 848.) So, likewise, if on the dip his vein united with the vein of a prior locator, he was made to realize most forcibly that from the point of union his rights ceased. Whatever may be said of the wisdom of the maxim above or of the policy of section 2336, the regulation in the one instance, and the statute in the other, embody the law as it is now and as it has been since the first quartz claim was located in this western country, and impose upon the courts the duty to apply the rule, regardless of consequences.

In the present instance, the Badger State and Emily veins unite above the point where Pilot territory is encountered, and many feet above the ore bodies in dispute. If section 2336 has any meaning at all, it is that from the point of union and down, the Badger State claim takes the entire vein. The Emily vein is terminated at the point of union as effectively as though the mineralization of the ground at that point ceased. Below the point of union there is not any Emily vein whatever. To give to the statute any other meaning is to interpolate something not found in the express terms or implied from anything suggested in either section 2336 or in the context.

The doctrine of extralateral rights had its origin in the theory that it is the vein which is actually located, and that the surface is a mere incident, necessary for the convenient development of the mine. The right as expressed in the early mining rules and regulations and in the Act of 1866 was the right to *follow the vein* on its dip to any depth; and we assert confidently that though the language employed in section 2322 above is somewhat different, it was intended to convey the same idea. If in this conclusion we are correct, the Emily has no extralateral rights east of point B, because it has no vein below the point of union which it can follow to the ore in dispute. From 1 to 2 (Fig. 3) the entire vein belongs to the Badger State and is a part and parcel of that claim. The Emily has no greater right between those points than an entire stranger, and to reach the ore bodies in dispute at 2 (Fig. 3), it must trespass upon either the Badger State or the Pilot claim. To say that it has a right which can be exercised only by committing a wrong is a contradiction of terms.

It is conceded by plaintiff, as it must be, that the right which it has by virtue of its ownership of the Emily claim is not enhanced by its common ownership with the Badger State claim, and that the Emily's rights are to be determined as though the Badger State claim was owned by a hostile stranger.

In support of our position that at and below the point of union, the Badger State owns the entire vein, we need appeal

only to the plain language of section 2336 above. (*Champion Min. Co. v. Consolidated Wyo. G. Min. Co.*, 75 Cal. 78, 16 Pac. 513; *Little Josephine Min. Co. v. Fullerton*, 58 Fed. 521, 7 C. C. A. 340; 27 Cyc. 587.)

By some of the courts and text-writers it is said that to entitle [3] a claimant to extralateral rights there must be continuity of vein from the apex to the ore in dispute; by others that there must be identity of vein. It is of little moment here which of these statements is correct; but that there must be continuity of right in the locator who seeks to follow a vein from the apex within his claim to the ore beneath the surface of another claim is in effect the holding of this court, and its correctness in our judgment cannot be gainsaid.

In *State ex rel. Anaconda C. Min. Co. v. District Court*, 25 Mont. 504, 65 Pac. 1020, there was presented the contention of O'Connor that by virtue of his ownership of a portion of the apex of a vein which cut the parallel end-lines of his Copper Trust claim, he should be entitled to the ore within a triangle under the surface of the Rob Roy, notwithstanding the rights of the St. Lawrence and Smoke Stack claims intervened and severed the vein between the Copper Trust apex and the ore in dispute. This court denied the claim and stated the rule of continuity of right in a single sentence: "O'Connor has no part of the apex of the vein so situated with reference to the ore bodies within the triangle that he may pursue the vein from the surface." O'Connor had the same right—if it could be called a right—to follow the vein from its apex in the Copper Trust through the Smoke Stack and St. Lawrence claims to the ore in controversy, as the Emily has to follow from the apex of its vein down the consolidated vein to the ore bodies beneath the Pilot surface, for the consolidated vein belongs to the Badger State and is as much a part of that claim as the vein beneath the St. Lawrence in the Copper Trust Case was a part of the [4] St. Lawrence claim. The only means by which O'Connor could reach the ore he claimed beneath the surface of the Rob Roy was by trespassing upon the intervening claims, and the

only access which the Emily has to the ore in controversy here is by trespassing upon the Badger State or Pilot, or both of them. In the language of this court above, it has no part of the apex of the Emily vein so situated with reference to the ore bodies in dispute that it may pursue the vein from the surface. The Badger State owns all the vein east of point B and below the union of the two veins, and presents an impassable barrier to the extralateral rights claimed by the Emily.

These views do not accord with the decisions of certain courts to which our attention is directed. In *Roxanna G. Min. & T. Co. v. Cons* (C. C.), 100 Fed. 168, Judge Hallett, without citing any authority to support his view, orally expressed the opinion that as between a junior locator whose vein unites on the dip with the vein of a senior locator, and the complainant whose claim contains no part of the apex of either vein, the junior locator has extralateral rights on the consolidated vein beneath the surface of complainant's claim, in ground not reached by the extralateral rights of the senior locator. It does not appear from the report whether any consideration was given by court or counsel to the common-law rights of the complainant, and we must content ourselves with a respectful dissent from Judge Hallett's conclusion.

Upon parity of reasoning, plaintiff's theory finds further support in certain decisions by the circuit court of appeals for the ninth circuit, in cases arising in the Coeur d'Alene district of Idaho. In *Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co.*, 109 Fed. 538, 48 C. C. A. 665, in what is known as the first *Stemwinder Case*, the court defined the extralateral rights to which the Stemwinder claim would have been entitled but for its failure to adverse the application of the Last Chance claim for patent. By that *dictum* it was intimated that the Stemwinder claim might assert extralateral rights upon the dip of the vein between the planes of its parallel end-lines, subject only to the superior rights of the Emma and Last Chance claims, even though it had the apex for only a portion of the distance between its end-lines. The court con-



ceived this to be the logical deduction to be drawn from the decision in *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895.

In *Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co.* (C. C.), 134 Fed. 268—the second *Stemwinder Case* arising out of conflicting interests asserted by the Stemwinder claim on the one hand, and the Viola and San Carlos claims on the other—Judge Beatty, in granting an injunction *pendente lite*, in effect awarded extralateral rights to the Stemwinder between planes drawn through its parallel end-lines projecting westwardly indefinitely, notwithstanding its limited amount of apex and the fact that the vein between the apex and the ore bodies in dispute belonged to the Emma and Last Chance claims. Judge Beatty apparently felt bound by the *dictum* in the first *Stemwinder Case*, but expressed his opinion that the conclusion was not warranted by anything found in the Del Monte decision.

In *Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co.*, 114 Fed. 417, 52 C. C. A. 219, there was involved the question of the extralateral rights of the Viola and San Carlos, adjoining claims having a common side-line which split the broad vein upon which each claim was located. The Viola was prior to the San Carlos and both were prior to the King location. The court held that as between the Viola and San Carlos, the former took the entire vein on its dip between the planes of its parallel end-lines extended indefinitely in their own direction, but that as between the San Carlos and the King, the former had extralateral rights on the vein between planes drawn through its parallel end-lines projected in their own direction, subject only to the superior rights of the Viola claim.

In *Wall v. United States Min. Co.*, 232 Fed. 613, Judge Marshall, sitting in the circuit court for the district of Utah, expressed himself satisfied with the conclusion reached in the *Viola Case*.

In *Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co.*, 121 Fed. 973, 58 C. C. A. 311, the court ap-

proved Judge Beatty's order granting an injunction in the case referred to above. In the course of the opinion, reference was made to the decision in the *Viola Case*, and the court said: "The Viola extralateral right did not wholly intervene at any point to cut off the ore body to which the San Carlos had the extralateral right; in other words, there was in that claim upon the outcrop of the ledge in the surface location a point from which the owners of the San Carlos could, without interruption and continuously, proceed on the ledge on its downward course to the full extent of the extralateral right awarded by the court." The court then disposed of the case in hand upon what it deemed an analogy found in the federal statute, and held that, though the vein upon which the Stemwinder claim asserted extralateral rights was completely severed between the apex and the ore in dispute by the prior rights of the Emma and Last Chance claims, still the Stemwinder had extralateral rights on the vein beyond the plane where the Emma and Last Chance rights ceased, and in support of this view observed: "If the vein upon which the Stemwinder is located were in fact a separate vein from that on which the Last Chance is located, but passed through the latter in the same direction in which extralateral rights are claimed in the present suit, there could be no doubt of the right of the owner of the Stemwinder to pursue the vein beyond the point of intersection, and to maintain a right of way through the vein of the Last Chance at the point of intersection. We see no reason why that right, which is so recognized by the statute, and which would probably be recognized in the absence of a statute, shall be denied when the point of intersection of extralateral rights is not upon separate veins, but upon the same vein." When the case was reached upon its merits, these views were reasserted. (131 Fed. 591, 66 C. C. A. 99) An appeal to the supreme court of the United States was dismissed (200 U. S. 613, 50 L. Ed. 620, 26 Sup. Ct. Rep. 754), and a petition for *certiorari* was denied (200 U. S. 617, 50 L. Ed. 622, 26 Sup. Ct. Rep. 754).

We agree with Judge Beatty that there is not anything to be found in the Del Monte decision to justify the *dictum* found in the first *Stemwinder Case*, which is contrary to the holding of this court in *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 30 L. R. A. 803, 42 Pac. 273, to the effect that a locator can have but the same number of feet along the vein beneath the surface as he has at the apex. To the same effect is *Tyler Min. Co. v. Last Chance Min. Co.*, above. While we do not assent to the reasoning advanced in the Viola decision, the conclusion that, as between the San Carlos and the King, the former owned the particular ore body in dispute, may be warranted by the fact, as suggested by the court above, that the San Carlos owned a part of the apex of the vein, which was not severed from the ore in dispute by the superior right of the Viola. We are unable to agree with either the conclusion or the reasoning of the circuit court of appeals in the second *Stemwinder Case*. The Stemwinder could reach the ore in dispute only by trespassing upon the Last Chance claim, and we decline to sanction the doctrine that a right may be exercised by the commission of a wrong. The ground of the learned court's opinion is altogether untenable. There is not any semblance of a parallel between the right which a locator has to a right of way through the point of intersection of crossed veins, and the wrong which the Stemwinder claim was forced to commit to reach the ore involved in that controversy. In the absence of statute, the junior locator could not reach the ore beyond the point where his vein crossed the vein of the senior locator, without committing a trespass; but by virtue of the express language of section 2336, and not otherwise, his act which would be wrongful is given the sanction of law. That section provides: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine." In other words, the government has carved out of the estate of the senior locator an ease-

ment or right of way through the point of intersection of crossed veins, in favor of the junior locator; but the government did not make any such reservation through the Last Chance claim, and with all due respect to the circuit court of appeals, we assert that it had no authority to make the reservation for the government. The decision can find support only in what appears to us to be purely judicial legislation.

It cannot be said that the refusal of the United States supreme court to entertain the appeal or its dismissal of the petition for *certiorari* is tantamount to an affirmance of the judgment rendered; for in *Lawson v. United States Min. Co.*, 207 U. S. 1, 52 L. Ed. 65, 28 Sup. Ct. Rep. 15, the court held directly contrary to the decision in the first *Stemwinder Case* upon the question of the extent of the estoppel created by the failure of the Stemwinder to adverse the application of the Last Chance for patent, though it had previously refused the Stemwinder's petition for *certiorari* to have that question reviewed.

So far as they are involved in this appeal, the rights of the Emily attach where those of the Badger State cease, and by virtue of its ownership of the apex from its west end-line to point B, it is entitled to extralateral rights beneath the surface of the Pilot between a plane projected through its west end-line to the north indefinitely, and a plane parallel thereto drawn through the points B, F (Fig. 2). (*Fitzgerald v. Clark*, above, affirmed in 171 U. S. 92, 43 L. Ed. 87, 18 Sup. Ct. Rep. 941.)

The triangle formed at B, C, F (Fig. 2) is not included within the rights of either of plaintiff's claims, and the ore within so much of that triangle as lies beneath the surface boundaries of the Pilot belongs to that claim by virtue of its common-law rights. (*Parrot S. & C. Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386, 53 L. R. A. 491, 64 Pac. 326.)

The cause is remanded to the district court with direction to modify the injunction order to conform to the views herein expressed.

*Remanded, with directions.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## ON REHEARING.

(Submitted January 5, 1916. Decided March 20, 1916.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

A rehearing was granted in this case for two reasons, viz.: (1) That the court was willing to hear further argument upon the question whether the right of the plaintiff to the extra-lateral portion of the Emily or Badger vein should be bounded to the east by the plane of the line A, C, or the plane of the line B, F (Fig. 4), as was held in the original opinion; and (2) that we were in doubt as to whether, assuming as correct the conclusion that the order of the district court was too broad, we did not too narrowly limit plaintiff's right upon the north vein to the east.

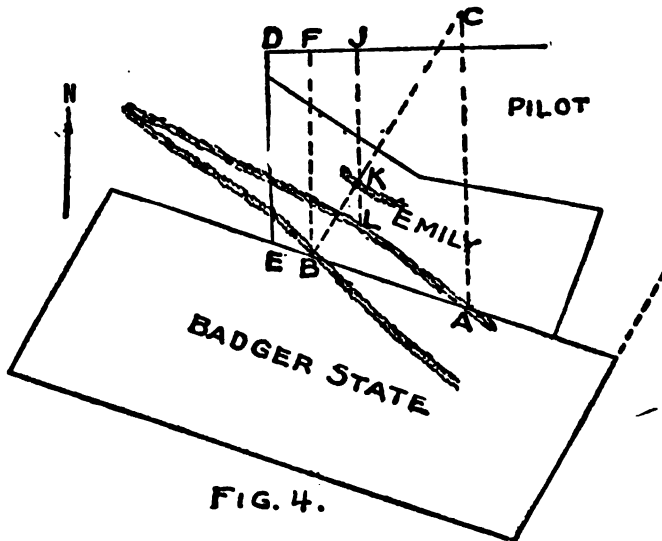


FIG. 4.

As regards the first question, we have concluded to adhere to the rule adopted and made the basis of the decision in *State ex rel. Anaconda C. M. Co. v. District Court*, 25 Mont. 504, 65 Pac. 1020, as more clearly within the purview and meaning of the federal statute than that adopted in the *Stemwinder* and

other cases based upon the same line of reasoning, cited and examined in the former opinion. We shall not enter again upon a discussion of this branch of the case.

The evidence discloses that the Emily discovery was made on [5] that portion of the vein referred to in the former opinion as the Badger vein to the west of the line B, C. There is also evidence tending to show that the branch to the north is a separate vein, until, upon its descent to near the 900-foot level of the Badger, it unites with the Badger vein. On this point the evidence is in conflict. Inasmuch as the trial court found all the issues for the plaintiff, we are justified in assuming that it found this issue in its favor also. Adopting this assumption for the purpose of this appeal, we have in the Emily a secondary vein, the apex of which is several hundred feet longer in extent than that of the discovery or original vein, and the question arises whether the extralateral rights of the plaintiff on this vein are properly limited toward the east by the plane of the line B, F, or should be limited by the plane of the line drawn parallel with B, F, from the point K, at which the line of the union of the two branches on the dip (indicated by the irregular line extending east from this point) crosses the line B, C, on the 900-foot level.

The significance of the condition presented by the facts thus assumed was not pressed upon our attention at the former hearing and was not considered. Under section 2322, United States Revised Statutes, the locator is granted the right to all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies within the vertical planes of his surface lines, with the right to follow them on their dip to their utmost depths, even though they depart beyond the vertical planes of the side-lines, provided the end-lines are parallel as required by section 2320. Thus all veins are made of equal dignity, and extralateral rights upon secondary veins, if they are so situated with reference to the parallel end-lines that extralateral rights attach at all, are to be measured by the same rule as are the rights upon the discovery or original vein. The length of the apex

intercepted by the planes of the end-lines will be the extreme limit of the rights upon the original vein. So must the rights on the secondary vein be limited, whether the segment of it intercepted in like manner be longer or shorter than the segment of the original vein. This was assumed in *Del Monte Min. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895, to be the meaning of the statute, and all the courts, so far as they have considered it, have so interpreted it in adjusting conflicting rights in particular cases. In *Iron Silver Min. Co. v. Elgin Min. Co.*, 118 U. S. 196, 207, 30 L. Ed. 98, 6 Sup. Ct. Rep. 1177, 1183, it was said: "It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses or dips, yet his [the owner's] right to follow them outside of the side-lines of the location must be bounded by planes drawn vertically through the same end-lines. The planes of the end-lines cannot be drawn at a right angle to the courses of all the veins if they are not identical." As was pointed out by Mr. Justice De Witt in *King v. Amy & Silversmith Con. Min. Co.*, 9 Mont. 543, 24 Pac. 200, the planes of the end-lines fix the direction of the extralateral rights from the point at which the vein is cut off along the strike because of its departure through a side-line or for any other cause. The fact that the planes bounding the rights along the original vein may under this rule be fixed in different places from those bounding the rights on the secondary vein, does not enlarge or lessen the rights which attach to the latter. The courts which have had occasion to consider the subject have, either in effect or by direct expression, adopted this view. (*Walrath v. Champion Min. Co.*, 171 U. S. 293, 43 L. Ed. 170, 18 Sup. Ct. Rep. 909; *Consolidated Wyo. G. Min. Co. v. Champion Min. Co.*, (C. C.), 63 Fed. 540; *Walrath v. Champion Min. Co.* (C. C.), 63 Fed. 552; *Ajax G. Min. Co. v. Hülkey*, 31 Colo. 131, 102 Am. St. Rep. 23, 62 L. R. A. 555, 72 Pac. 447; *Montana Min. Co. v. St. Louis M. & M. Co.*, 102 Fed. 430, 42 C. C. A. 415; *Id.*, 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; *Id.*, 183 Fed. 51, 105 C. C. A.

343; *Work Min. & M. Co. v. Doctor Jack Pot Min. Co.*, 194 Fed. 620, 114 C. C. A. 392; see, also, Lindley on Mines, secs. 593, 594, with accompanying diagrams.) In *Ajax G. Min. Co. v. Hülkey*, *supra*, the court states its conclusion as follows: "Our conclusion is that for all veins, both discovery and secondary, of a patented claim, the owner has extralateral rights, at least for so much thereof as apex within the surface lines; that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end-lines of the location, as fixed and described in the patent, are the end-lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end-lines, need not be coincident." This seems to be the obvious result of the rule that the extralateral rights are to be measured by the length of the apex found within the boundaries of the claim. Of course, below the point of union the Badger takes the vein, but no farther west than the line B, C; and since there is within the Emily claim a portion of the apex of the united vein which is not taken by the Badger, the portion of the united vein attaching to this apex must of necessity belong to the Emily. If the Badger were not the senior location, the rights of the Emily would be limited to the east by the line A, C. Now, applying the formula suggested by Mr. Lindley (Lindley on Mines, sec. 594, p. 1394), and subtracting the rights of the Badger, the rights of the Emily on the south vein are obviously to be limited to the east by the line B, F, and on the north vein by the line J, L. The accident of the union of the two branches becomes of significance only when the right to the united vein is the subject of inquiry. This inquiry is to be determined by an ascertainment of the fact of priority of location. (U. S. Rev. Stats. 2336.) This question aside, the locator who has



any part of what may be regarded as the apex of the united vein must of necessity be deemed the owner of the extralateral rights on the portion not taken by the senior locator, because there is no other person who can make legal claim to it.

The cause is remanded to the district court, with directions to modify the injunction order to conform to the views herein expressed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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IN RE GOMEZ.

(No. 3,825.)

(Submitted March 13, 1916. Decided March 20, 1916.)

[156 Pac. 1078.]

*Criminal Law—Habeas Corpus—Office of Writ.*

*Habeas Corpus*—Writ Does not Lie, When.

1. Where the jury found the defendant guilty of assault in the first degree, and, in an endeavor to exercise the discretion vested in them by the Indeterminate Sentence Law (Laws 1915, p. 21), fixed his punishment "at not less than — years nor more than ten years" in the state prison, and the judge in pronouncing sentence assessed the punishment at not less than ten nor more than twenty years, instead of requiring the jury to again retire and supply the omission in their verdict, the writ of *habeas corpus* did not lie.

Same—Office of Writ.

2. The office of the writ of *habeas corpus* is not that of an appeal or writ of error to review irregularities in the verdict or judgment.

[As to scope of review on *habeas corpus*, see note in 87 Am. St. Rep. 171.]

IN THE MATTER of the application of Andrew Gomez for writ of *habeas corpus*. Application dismissed and complainant remanded.

Mr. G. Stanley Walters and Mr. J. B. Herford, for Complainant.

Mr. J. B. Poindexter, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for the State.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

*Habeas corpus.* The complainant is confined in the state prison under a judgment of conviction for assault in the first [1] degree. At the trial the jury returned the following verdict: "We, the jury in the above-entitled court and cause, find the defendant Andrew Gomez guilty of the crime of assault in the first degree as charged in the information herein, and fix his punishment at not less than — years nor more than ten years in the state prison."

Instead of requiring the jury to amend the verdict to make it conform to the requirements of the Indeterminate Sentence Law (Laws 1915, p. 21), the court accepted it, and permitted it to be filed with the clerk. Thereafter in pronouncing sentence, it disregarded the attempt of the jury to assess the punishment and sentenced complainant to a term of not less than ten nor more than twenty years in the state prison, the latter being the maximum fixed by the statute for this crime. (Laws 1911, p. 9.) The complainant insists that the judgment is void, in that the verdict is insufficient to support it, and hence he is entitled to his release.

There can be no question that the jury intended to exercise the discretion vested in them by the statute. (Rev. Codes, sec. 9329.) This is evidenced by the fact that they fixed a maximum of punishment. Since they were vested with this discretion and it was apparent that they failed to exercise it properly by fixing the minimum as well as the maximum, it was the duty of the court to send them out again under proper instructions to supply the omission. (Rev. Codes, sec. 9323.) Complainant had the right to demand that this course be pursued, and by timely objection to the reception of the verdict and reservation of his exception to put himself in a position to assail the integrity of the judgment on appeal. But it does not therefore follow that the judgment is wholly void. Let it be conceded that the court committed prejudicial error. Such error did not divest it of jurisdiction to assess the punishment and pronounce

judgment in pursuance of the statute. (Rev. Codes, sec. 9330.) This section, we apprehend, was intended to include cases such as this, in which the jury have inadvertently failed to exercise their discretion correctly, as well as those in which they have intentionally left the office of assessing the punishment to the discretion of the court. Such, in effect, was the decision in *In re Lewis*, 51 Mont. 539, 154 Pac. 713. The terms employed in the statute do not permit any other conclusion. The verdict being sufficient as a finding of his guilt, the complainant cannot in this proceeding question the validity of the judgment pronounced upon it. The office of the writ of *habeas corpus* is not that of an appeal or writ of error. Its only office is to present the inquiry whether the court *a quo* had jurisdiction of the subject matter and the defendant, and rendered such a judgment as the law authorizes in the particular case. When it appears that this was the condition, the writ will be discharged. (*In re Thompson*, 9 Mont. 381, 23 Pac. 933; *In re Boyle*, 26 Mont. 365, 68 Pac. 409, 471; 21 Cyc. 297.) If a trial court must in every case require the jury to return a verdict technically correct in every particular, at the peril of having the validity of the judgment rendered thereon successfully assailed on application for *habeas corpus*, section 9330 can never have any potency. What moved the court to pursue the course it did in assessing the punishment we do not know, nor may we on this application inquire. That it had power to pronounce sentence as it did, we have no doubt.

The application is therefore dismissed, and the complainant is remanded to the custody of the warden of the state prison.

*Dismissed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

IN RE WILLIAMS' ESTATE. WILLIAMS, RESPONDENT, v.  
DAVIS ET AL., APPELLANTS.

(No. 3,690.)

(Submitted March 23, 1916. Decided April 30, 1916.)

[156 Pac. 1087.]

*Wills—Probate Proceedings—Contest—Testamentary Incapacity—Undue Influence—Want of Publication—Evidence—Wealth of Beneficiary—Findings—Inconsistency—Witnesses—Impeachment—Rebuttal—Trial—Reading Court Opinion—Discretion.*

**Wills—Probate Proceedings—Trial.**

1. Where in a will contest the district court reserved its decision upon proponents' offer of it for probate and then after a jury trial, rendered judgment rejecting it, complaint that the offer was never passed upon was without merit.

**Same—Contest—Wealth of Beneficiary—Evidence—Admissibility.**

2. Evidence of the great wealth of the principal beneficiary under a will attacked for incapacity of the testatrix and undue influence, was admissible as tending to show an unnatural disposition of her property, it appearing that by it she practically disinherited her grandchild, who was her only near blood relation and for whom she had always manifested the greatest affection.

**Same—Trial—Reading Court Opinion—Discretion.**

3. Failure to excuse the jury while counsel, during the examination of a witness and over objection, read from the opinion of another court in another case, was not reversible error, in the absence of a showing of abuse of its discretion.

**Same—Witnesses—Impeachment—Rebuttal.**

4. Where the character of a witness whose deposition had been introduced was attacked by a deposition showing that at the time of the trial he was confined in a penitentiary, evidence of his previous good character was admissible in rebuttal.

**Same—Finding—Inconsistency.**

5. A finding of want of testamentary capacity is not so far inconsistent with one of undue influence that both may not stand.

[As to tests of undue influence, see note in 31 Am. St. Rep. 670.]

**Same—Appeal and Error—Burden of Appellant.**

6. Where the probate of a will was attacked on the grounds of want of publication, incapacity of the testatrix and undue influence, and a decree rendered based on findings sustaining all such grounds, appellants had the burden of showing that all the findings were erroneous, since the correctness of any one of them was sufficient to sustain the decree.

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As to effect of unnatural disposition of property on the question of undue influence, see notes in 22 L. R. A. (n. s.) 1024; 6 L. R. A. (n. s.) 202.

*Appeal from District Court, Silver Bow County, Second Judicial District; R. Lee Word, a Judge of the First Judicial District, presiding.*

IN THE MATTER of the estate of Rachel E. Williams, deceased. Proceeding by Andrew J. Davis and Lyman M. Harley for the probate of an alleged will, contested by Dorothy Alice Williams by her guardian, Sibyl Scott. From a judgment for contestant and an order denying a new trial, proponents appeal. Affirmed.

*Messrs. Shelton & Furman, Mr. James A. Poore and Messrs. Maury, Templeman & Davies*, for Appellants, submitted a brief as well as one in reply to that of Respondent; *Mr. H. L. Maury* argued the cause orally.

Evidence of the wealth of Davis was inadmissible. The financial condition of a legatee who was a mere acquaintance cannot be shown. (*In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 373.) Where a testator left his estate to a person who was not related to him, and named the father of the legatee as executor, the fact that the executor was a wealthy man is irrelevant to the issue. (*Murphree v. Senn*, 107 Ala. 424, 18 South. 264.) And evidence of wealth is incompetent even though the legatee is the sole person named in the will and the testator left next of kin. (*Murphree v. Senn*, 107 Ala. 424, 18 South. 264.) *In re Kaufman's Estate*, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192, the trial court permitted the contestant, against the objection of the proponent, to give evidence of the amount of property owned respectively by the husbands of the beneficiaries under the will, and also that the contestant and her husband were comparatively without any property. Held error. (See, also, *In re Lavinburg's Estate*, 161 Cal. 536, 119 Pac. 919.)

There are authorities which hold that the provisions of the will may be considered, in connection with other evidence, in trying the question of undue influence, but the disposition of the property as made in the will is not of itself evidence of

such influence; and the court cannot assume to judge of the justice of the provisions of the will, or question the motives of the testator in making it. (*In re Hess' Will*, 48 Minn. 504, 31 Am. St. Rep. 665, 51 N. W. 614.) And some of the authorities hold that the unnatural disposition of property is one of the elements to be considered in determining the question of undue influence, but it has no effect in the absence of other testimony going to prove undue influence, for every person possessing testamentary capacity may, except so far as his right is restricted by statute, dispose of his property by his will as he sees fit, and no matter how unjust the disposition may be, it does not of itself raise a presumption of undue influence. (*Knox v. Knox*, 95 Ala. 495, 36 Am. St. Rep. 235, 11 South. 125; *Storer's Will* (*Storer v. Zimmerman*), 28 Minn. 9, 8 N. W. 827.) Undue influence, sufficient to invalidate a will, is that kind of influence which prevents the testator from exercising his own judgment, and substitutes in the place thereof the judgment of another. (*In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597; *In re Rick's Estate*, 160 Cal. 450, 117 Pac. 532; *In re Holbert's Will*, 15 Misc. Rep. 308, 37 N. Y. Supp. 757.) To establish the charge of undue influence or fraud, two points must be sustained: First, the fact of the deception practiced or the influence exercised; and second, that this fraud and influence were effectual in producing the alleged result. (Schouler on Wills, 5th ed., 292; *In re Hess' Will*, *supra*.)

Reading from decisions which do not state the law of the case in the presence of the jury may have such a bearing upon their minds as to mislead them, and is reviewable on appeal (*Gregory's Admr. v. Ohio River Co.*, 37 W. Va. 606, 16 S. E. 819; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; 38 Cyc. 1480, 1481.) The reading of decisions in the presence of the jury is not to be commended, and if permitted, the matter read must be pertinent to the issue. (*Hastings v. Northern Pac. R. Co.*, 53 Fed. 224; *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.)

On the subject of inconsistent findings, we claim the law to be that an order should be made granting a new trial (a) if the findings of the special verdict are inconsistent with each other as to a material matter; (b) that a new trial should be granted if the findings on a material matter are inconsistent with an undisputed fact, where the testimony comes from disinterested witnesses, and there is no presumption to aid it; (c) that a new trial should be granted if a finding on a material matter in favor of a party on whom the burden of proof rests is not supported by any testimony. We claim that either of these three conditions demonstrates that the jury was actuated by prejudice or passion, or such a bias as prevented the party aggrieved thereby from having a fair or an impartial trial. (*Kansas City R. R. Co. v. Ryan*, 52 Kan. 637, 35 Pac. 292; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 296; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879.)

*Mr. J. E. Healy*, for Respondent, submitted a brief and argued the cause orally.

The answer of the jury to a special question propounded by a contestant is binding upon him. (*Gumtow v. Janke*, 177 Mich. 574, 143 N. W. 616.) The same rule should apply to the proponents in this instance.

The findings of the jury conclusively disestablish the proposed will. (40 Cyc. 1341, notes 24, 25 (III); *Macafee v. Higgins*, 31 App. (D. C.) 355.) Where the verdict is had in favor of the caveator in a contest based upon several grounds, reversal can be had on appeal only upon showing error in regard to each of the grounds stated. (*Macafee v. Higgins*, *supra*.) In this connection, see, also, *Eckert v. Page*, 161 App. Div. 154, 146 N. Y. Supp. 513.

As to the error urged with relation to the admission of evidence touching the wealth of Davis, we again content ourselves with the following authorities: *Borland on Wills*, 239; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Mourry v. Norman*, 223 Mo. 463, 122 S. W. 724. In any proper case the wealth

of the parties may be given in evidence for relevant purposes and within reasonable bounds. (*Downs v. Cassidy*, 47 Mont. 471, Ann. Cas. 1915B, 1155, 133 Pac. 106; Borland on Wills, 239, note 31.)

The unjust, unnatural and unreasonable disposition of property by a testator who shows no animosity toward a person slighted in a will, in favor of one to whom there was given large property without reason, may always be shown to the jury. (*Martin's Estate*, 170 Cal. 657, 151 Pac. 141; *Wasserman's Estate*, 170 Cal. 101, 148 Pac. 932.) The issues of non-execution and of undue influence were each and both submitted to the jury upon the request of the proponents under their instructions offered, together with the other special findings requested by them as well. So, having offered these findings and instructions, they cannot complain of them. (*Yegen Bros. v. Board of Commissioners*, 34 Mont. 79, 85 Pac. 740.) And also having injected these features into the case, they cannot put the court in error for having submitted inconsistent issues, if it be thought that these issues are inconsistent. I submit that any inconsistency is more fancied than real. The findings are not so intimately connected that error in one implies error in the other. Hence, if either be supported by the evidence, and it does not appear that substantial error intervened affecting it, the other may be regarded as immaterial. (*In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1005.)

In the present case, the evidence overwhelmingly preponderates—from any point of view—in favor of the nonexecution of the alleged will and of the issue of undue influence, that it shows a single purpose on the part of the proponents, at all times, logically resulting in this alleged and unnatural will. (Schouler on Wills, sec. 165.) Evidence of affection and declarations thereof for Dorothy were properly admitted. (*Lavinburg's Estate*, 161 Cal. 536, 119 Pac. 915; 3 Wigmore on Evidence, sec. 1738, p. 2243.) An unjust or unnatural will may be corroborative evidence of undue influence. (Schouler on Wills, sec. 165;



Borland on Wills, p. 259, note 28; 40 Cyc. 1032-1035.) So it was also proper to show who, if anyone, had the means and opportunity of instilling prejudices into the mind of Mrs. Williams. (*In re Esterbrook*, 83 Vt. 229, 75 Atl. 1.)

As to the admission of testimony relating to the reputation of Frank C. Norbeck for truth and veracity, there was no error committed whatsoever. In the first place, the objection made to the attempted impeachment of Norbeck by proof of conviction should have been sustained. But the court allowed other than the statutory methods to be pursued in impeaching Norbeck. Either by way of producing the record of the judgment, or by asking the witness on cross-examination, it may be shown that he has been convicted of a felony. (Rev. Codes, secs. 8024, 8030, 8031, 7999, 8001.) This was never done; and to violate the statute was error. (*State v. Black*, 15 Mont. 143, 38 Pac. 674; *State v. Crowe*, 39 Mont. 174, 177, 18 Ann. Cas. 643, 102 Pac. 579.) The application to take the deposition was not within the statute; there was no testimony sought to be obtained to prove any issue of fact. (Rev. Codes, sec. 7999.) Norbeck was never convicted of a felony. Section 5209 of the Revised Statutes of the United States makes the offense a misdemeanor. Norbeck could not be impeached as to a misdemeanor. (*People v. McGee*, 24 Cal. App. 563, 141 Pac. 1058.) Depositions will not be allowed for the mere purpose of impeachment. (*Woods v. Mann*, 2 Sumn. 316, 30 Fed. Cas. No. 17,953.) In any event, the impeachment of Norbeck, if it be regarded as such, was upon collateral matters only, and the test, as to what is a collateral matter, is thus made by Chief Baron Pollock: "Whether it concerns a matter which you would be allowed on your part to prove in evidence independently of the self-contradiction, i. e., if the witness had said nothing upon the subject." (*Trabing v. California Nav. & Imp. Co.*, 121 Cal. 137, 53 Pac. 644; Wigmore on Evidence, sec. 1020.) A witness is entitled to the same privileges and immunities when a deposition is taken as when examined in open court. (*Ex parte Button*, 83 Neb. 636, 23 L. R. A. (n. s.)

1173, 120 N. W. 203; Kerr's Code Civ. Proc., sec. 7, p. 2453.) Only the way permitted by law may be followed. (Cal. Code Civ. Proc., Kerr's ed., p. 2480, notes, 30, 33, 34, 36, 37, 48.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Upon the former appeal (*In re Williams' Estate*, 50 Mont. 142, 145 Pac. 957) a new trial was awarded because the evidence was insufficient to show due publication of the writing proffered as the last will and testament of Rachel E. Williams, deceased. Upon the second trial the subscribing witness Estabrook so far changed his testimony as to supply the deficiency noted in our former opinion, but the testimony of Norbeck, the other subscribing witness, is to the effect that nothing whatever was done or said by Mrs. Williams, at the time the writing was signed, to indicate that it was understood or intended by her to be her will. The jury were at liberty to accept Norbeck's testimony and find that there was not any publication, or they could believe Estabrook and Harley and reach the contrary conclusion. They chose the first alternative and, in response to special interrogatories, returned that Mrs. Williams did not publish or declare to either subscribing witness that the writing in question was her will. That finding is supported by competent evidence. The jury passed upon the credibility of Norbeck in the first instance; the presiding judge reviewed the evidence on motion to adopt the findings and a distinguished member of the state's judiciary, called in to pass upon the motion for a new trial upon the cold record, in denying the motion has stamped the seal of his approval upon the special verdict. Under these circumstances we might with propriety refer to our former decision as conclusive, and upon that authority affirm the judgment and order below. But counsel for appellants insist that certain prejudicial errors were committed, and because of them a fair and impartial trial of the issues was not had.

1. The proponents first made out their *prima facie* case to the court sitting without a jury. The will was received in evidence [1] and was then formally offered for probate. The court reserved its decision upon the offer, called a jury and tried the contest—the contestant assuming the burden as plaintiff—and the will was again offered and received in evidence. The jury returned special findings which were adopted, and a judgment was rendered in which the trial court declared: "That the said instrument offered herein for probate be and the same is hereby adjudged to be rejected and to be of no force or effect as the or any last will and testament of Rachel E. Williams, deceased; that the same is held for naught, and that the same is denied to probate." Complaint is made that the court never passed upon appellants' offer of the instrument for probate, but the recital from the record above is a sufficient answer. In the matter of procedure, the cause was tried so well that it deserves commendation. It was in all respects technically correct. (*In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004; *Farleigh v. Kelley*, 28 Mont. 421, 63 L. R. A. 319, 72 Pac. 756; *In re Williams' Estate*, above.)

2. Mr. Andrew J. Davis was called as a witness for contestant and, over objection, was required to answer as to his wealth [2] at the time the alleged will was executed. He testified in substance that he was then worth more than \$1,000,000. The court's ruling upon the admissibility of this evidence is assigned as error. By the terms of the alleged will, this contestant, Dorothy Alice Williams, was cut off with \$500; a domestic was to receive \$1,000; and all the residue of the \$100,000 estate was bestowed upon "Andrew J. Davis, adult banker \* \* \* as his property absolutely." The will was attacked for (a) failure of due execution, including publication; (b) incapacity of the testatrix; and (c) undue influence.

Rachel E. Williams had but one child, George H. Williams, who died about January 7, 1907, leaving surviving him an only child, Dorothy, the contestant herein, who was then but 7½ years old. The record establishes that Mrs. Williams had always

manifested the greatest affection for her granddaughter, and had confided to the wife of her family physician that she intended to devote at least \$20,000 to Dorothy's education; that the child visited her grandmother frequently and, when away from her, they corresponded to some extent; that about January 24, 1907, Dorothy went from her home in Helena to Anaconda and spent three or four days with Mrs. Williams. The record further discloses that as early as December 21, 1906, Mrs. Williams, a woman then of seventy years or upward, was suffering from a general breakdown; that she was the victim of nephritis, commonly called Bright's Disease; that the disease was in an advanced stage and progressing rapidly; that to take her from her home in Butte to Anaconda it was deemed necessary to move the railway car to a point near her home, rather than attempt to move her to the depot, and that her family physician should accompany her; that she was very weak on January 7; that at the time this writing was signed, according to the witness Norbeck, "she looked like a very ill person \* \* \* and did not seem to be much interested in the proceedings. \* \* \* There was nothing said by Mrs. Williams or anyone about the nature of the contents of the papers." On February 27, Mrs. Williams was in a state of coma, and on March 3 she died.

Bowed down by the keenest grief for the loss of her only child—George—without near relatives in all the world, except her seven year old granddaughter, to whom her attachment would naturally be greatly intensified after her son's death, and within two weeks after that loss occurred, it is pretended that Mrs. Williams made her will, cutting off her only blood kinship with a bare pittance and bestowing her comfortable fortune upon a millionaire banker, not in any wise related to her by ties of blood, marriage, or even intimate friendship, and that two or three days after making such disposition of her property, she received and entertained her granddaughter for a considerable time at her apartments in Anaconda. It is unnecessary to refer to the medical testimony characterizing the

dread disease from which Mrs. Williams suffered and died, or the effect upon the mind of the retention in the system of the morbid matters which the diseased organs were powerless to throw off. It suffices for present purposes to say that we incline to the belief that the evidence of the intimate relationship between Mrs. Williams and her grandchild, of her physical condition and the peculiarly unnatural disposition of her property furnished a sufficient foundation for the legitimate inference that at the time this writing in question was executed, Mrs. Williams did not possess testamentary capacity. Upon this hypothesis, the evidence of Mr. Davis' wealth was unquestionably competent and material; but in their brief counsel for appellants insinuate, without asserting, that the disposition of her property by Mrs. Williams was neither harsh nor unnatural, but, on the contrary, evidenced her wisdom and her business acumen. They say: "She made a millionaire adult banker her ostensibly sole beneficiary under the will for the express purpose of protecting Dorothy, and of providing a safe conduit for Dorothy's second very considerable fortune until the day when the law says that Dorothy is wise enough to handle it herself." In this counsel exceed the bounds of argument. There is not the slightest intimation in the record, so far as we can ascertain, that this contestant has ever received a cent from any source, or that Mrs. Williams intended to create a trust fund for Dorothy's use or benefit. The alleged will itself declares that the devise is to Mr. Davis "*as his property absolutely,*" and the history of this litigation demonstrates that the principal beneficiary is standing upon what he deems his strict legal rights to have this property as his own.

Upon the record we say that the will undertook to make a most unnatural disposition of the property, and evidence of such fact is always admissible as a circumstance to be considered with other evidence, as tending to show an unbalanced mind or a mind easily susceptible to undue influence. (Ross on Probate Law and Practice, sec. 51.)

In *Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, the court said: "If a man who had always lived in apparently the most affectionate relations with his family should leave a will in which all his property was granted to strangers, and no reason could be suggested or explanation made why he thus disinherited those near relatives whom he had always seemed to love, this circumstance would certainly tend to show some delusion or alienation of reason at the time of the testamentary act."

In 1 Schouler on Wills, fifth edition, section 77, the same subject is covered in a sentence: "In fine, a harsh and unnatural disposition by the will in question is a circumstance which tends to discredit the maker's testamentary capacity." (See, also, section 240.)

The evidence of the principal beneficiary's great wealth was competent for the very purpose of emphasizing the unnatural and unusual disposition which Mrs. Williams apparently attempted to make of her fortune. (*Mowry v. Norman*, 223 Mo. 463, 122 S. W. 724; *In re Esterbrook*, 83 Vt. 229, 75 Atl. 1; 40 Cyc. 1034, 1035; 28 Am. & Eng. Ency. of Law, 2d ed., 106; *Manatt v. Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717.)

The testimony relating to Mr. Davis' wealth was competent. The weight to be given to the evidence of an unnatural disposition of the property was for the jury.

3. Counsel for proponents having objected to a question asked [3] the witness Mrs. Freund, the attorney for contestant called the court's attention to *Meier v. Buchter*, 197 Mo. 68, 7 Ann. Cas. 887, 6 L. R. A. (n. s.) 202, 94 S. W. 883, and over objection read to the court, in the presence of the jury, Judge Lamm's vigorous opinion. We cannot upon this record convict counsel of unprofessional conduct in seeking by indirection to get before the jury the facts of the *Meier Case* and the comment thereon, when ordinarily he would not be permitted to read the opinion to the jury directly. (*Mahoney v. Dixon*, 34 Mont. 454, 87 Pac. 452.) We must assume that counsel acted in good faith, and, if so, it was a matter within the discretion

of the trial court whether the jury should be excused during the reading. There is no evidence of any abuse of discretion. We think the presiding judge remarked pertinently that he could not excuse the jury every time an objection was to be considered.

4. The contestant's case depended very largely upon the evidence furnished by the subscribing witness Norbeck. His testimony was placed before the jury by contestant in her case in chief. Proponents then introduced a deposition which disclosed that at the date of this second trial, Norbeck was confined in the federal prison at McNeil Island, serving a sentence imposed by the United States district court for the district of Idaho. In rebuttal, contestant called certain witnesses who, over objection of proponents, were permitted to testify to Norbeck's good reputation. It is quite evident that the principal, if not the sole, purpose of introducing the deposition was to discredit Norbeck. It was a direct attack upon his character, and the correctness of the court's ruling in permitting contestant to fortify his credit by evidence of his previous good reputation is so manifest that the citation of authority would seem unnecessary. The rule is as old as the law itself, and is embodied in our statute. (Rev. Codes, sec. 8026.) See 5 Jones' Commentaries on the Law of Evidence, sections 865-867, where abundant authority to sustain the trial court's ruling will be found and the decided cases cited.

5. The trial court submitted to the jury thirteen special interrogatories, which were all answered. It is now insisted that [5] these findings are so inconsistent that they destroy each other, or at least demonstrate that the jurors were actuated by bias or prejudice. Briefly summarized, the findings are: That on January 21, 1907, when the alleged will was executed, (a) Rachel E. Williams was not of sound and disposing mind; (b) she did not subscribe the instrument *as her last will and testament*; (c) she did not publish it as her will; (d) she did not request Norbeck and Estabrook each to sign his name as a witness; (e) Mrs. Williams was not acting freely, but was under

the undue influence of Lyman M. Harley. The only possible inconsistency is between the first and the last; but a finding of want of testamentary capacity is not so far inconsistent with a finding of undue influence that both may not stand. (*In re Murphy's Estate*, above.) It may be conceded that the evidence is insufficient to sustain the finding of undue influence. We have already determined that the finding of want of publication is sustained by sufficient competent evidence, and that finding alone is fatal to appellants' claim. Without due publication there is not a will, and if the writing is not a valid will, neither of these appellants is concerned in the least.

The further findings that Mrs. Williams was without testamentary capacity, and that she labored under the undue influence of Harley, might well be disregarded. There were facts and circumstances from which the jury might have determined the question of mental capacity as they did, and from which they doubtless drew their conclusion that the testatrix was acting under undue influence. Whatever else may be said of the evidence upon which these two findings were made, there is sufficient substance to it to exonerate the jury from any imputation that the findings are merely indicative of passion or prejudice.

It cannot be contended that because of an erroneous finding, [6] a judgment, otherwise proper and fully sustained by correct findings, must be set aside. Appellants must bear the burden of showing that there is not any correct finding which will sustain the judgment. (*McDermott v. Severe*, 202 U. S. 600, 50 L. Ed. 1162, 26 Sup. Ct. Rep. 709; *Dexter v. Codman*, 148 Mass. 421, 19 N. E. 517; *Morgan v. Adams*, 29 App. Cas. (D. C.) 198.)

It is beside the question that the evidence upon all the issues submitted was in sharp conflict, or that there were presented other facts and circumstances from which a different jury or another trial judge might reach a different conclusion. The jury passed upon the credibility of the witnesses in the first instance, and the trial court did likewise in review upon the



motion for a new trial. With their determination we do not feel justified in interfering.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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STATE, RESPONDENT, v. KEELER, APPELLANT.

(No. 3,740.)

(Submitted February 15, 1916. Decided April 10, 1916.)

[156 Pac. 1080.]

*Criminal Law—Rape—Information—Constitution—Public Trial—Refusal—Prejudice—Presumptions—Evidence.*

**Rape—Information—Sufficiency.**

1. Failure to charge an assault in an information for rape on a female under the age of consent, and that prosecutrix was a human being, did not render the pleading insufficient.

**Same—Evidence of Other Like Offenses—Admissibility.**

2. Evidence of acts of intercourse between defendant and prosecutrix occurring within six weeks after the act relied on by the state for conviction under an information for rape, was admissible.

**Same—Trial—Remarks by Judge—Discretion.**

3. Remarks made by the trial judge during the progress of a criminal trial which did not show an abuse of his discretionary power and duty to see that the witnesses were protected from misrepresentations by attorneys, that their testimony could be understood and the trial conducted with reasonable expedition, were not ground for reversal of the judgment of conviction.

**Same—Precautionary Instruction—When Refused not Error.**

4. An offered instruction that rape cases are prosecutions attended with great danger, and afford an opportunity for the display of malice and primary vengeance, such charges being easily invented and maintained, and that the jury should hesitate to convict solely on the testimony of the prosecutrix, was properly refused, where there was nothing in the record to indicate that the prosecution was instituted through malice or for private vengeance, and another instruction sufficiently covering the subject had been given.

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On question of right of court to exclude public from courtroom during criminal trial, see notes in 9 L. E. A. (n. s.) 277; 12 L. E. A. (n. s.) 98; 27 L. E. A. (n. s.) 487; 44 L. E. A. (n. s.) 583.

And as to right of defendant to public trial, see note in 14 L. E. A. 309.

**Same—Trial—Exclusion of Public—Constitution—Reversal of Judgment.**

5. In a prosecution for rape, the court made an order that on account of the nature of the case no one should be allowed in the courtroom in addition to those then present, and those present, after once leaving, could not return, court officers, doctors, attorneys and newspapermen being excluded from the order. *Held* that by an enforcement of the order the defendant was denied the right to a public trial guaranteed by section 16, Article III, of the Constitution, to one charged with crime. (MR. JUSTICE SANNER dissenting.)

[As to right of court to hear matrimonial action *in camera*, see note in *Ann Cas.* 1913E, 639.]

**Same—Denial of Public Trial—Prejudice—Presumption.**

6. Where one accused of crime shows that he was denied a public trial contrary to the provision of section 16, Article III, of the Constitution, the law imputes prejudice.

**Constitution—Construction—Rule.**

7. The provisions of the state Constitution must be construed in the light of the conditions prevailing in Montana at the date of its adoption.

*Appeal from District Court, Gallatin County; Ben B. Law, Judge.*

LEWIS KEELER was convicted of statutory rape, and from the judgment of conviction and an order denying him a new trial, he appeals. Reversed and remanded.

Mr. George D. Pease, for Appellant, submitted a brief and argued the cause orally.

The court erred in making an order excluding the public from the trial of the cause over the objection of the defendant. The attention of the court is called to two cases upon this subject, the case of *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153, and *People v. Murray*, 89 Mich. 276, 28 Am. St. Rep. 294, 14 L. R. A. 809, 50 N. W. 995. These two cases distinguish a number of other cases on the same proposition. In the *Hartman Case* the court made an order excluding from the courtroom during the trial of the case all persons except the officers of the court and the defendant. In the Michigan case the court held that the constitutional rights of Murray were violated by an order of the court to the police officer stationed at the door of the courtroom that he should stand at the door and see that the room was not overcrowded, but that all respectable citizens should be admitted and have

an opportunity to get in whenever they should apply. The supreme court of Oregon in the case of *State v. Osborne*, 54 Or. 289, 20 Ann. Cas. 627, 103 Pac. 63, follows with approval the case of *People v. Hartman*, above. (See, also, *Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651; *State v. Hensley*, 75 Ohio St. 255, 116 Am. St. Rep. 734, 9 Ann. Cas. 108, 9 L. R. A. (n. s.) 277, 79 N. E. 462.)

The action of the court in making the statements complained of, under the circumstances in which they were made, was unwarranted and uncalled for, and it will be observed, further, that in every instance the action of the court was to either elicit testimony against the defendant or comment upon the evidence unfavorably to the interest of the defendant. While exceptions were not noted by the defendant to the matters above, the same are submitted for the purpose of showing the general attitude of bias and prejudice of the trial judge toward the defendant.

The law does not authorize the trial court to comment upon the evidence and to unjustly criticise counsel, as was done in this case. (*Kirk v. Territory*, 10 Okl. 46, 60 Pac. 801.) In *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 853, it was said: "The court has no right, except when advising acquittal, to give any expression of its opinion as to the weight of evidence." Comments by the trial judge, in the hearing of jury, on evidence introduced or about to be introduced, giving expressions of his opinion which may tend to influence their conclusions, or weight given to such evidence, constitute error. (*People v. Hare*, 57 Mich. 505, 24 N. W. 843; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 843; *Peeples v. State*, 103 Ga. 629, 29 S. E. 691; *People v. O'Hare*, 124 Mich. 515, 83 N. W. 279; 12 Cyc. 540, 541.)

There was no proof of venue in the case. The only proof of venue made by the state was that Joseph Reinelt, the father of the prosecuting witness, had a homestead in Gallatin county, Montana. Then all of the evidence of the state was that the alleged offense was committed "in the brush" about a half

mile from the homestead. There was absolutely no evidence introduced that the brush was situated in Gallatin county. The venue of a crime must be established clearly and beyond all reasonable doubt. (*Gosha v. State*, 56 Ga. 33; *State v. Keeland*, 39 Mont. 506, 104 Pac. 513.)

*Mr. J. B. Poindexter*, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Alvord* argued the cause orally.

The first error complained of is that the appellant was denied a public trial by the court below. Under a similar order and a quite similar state of facts the supreme court of North Dakota held that there was no error shown. (*State v. Nyhus*, 19 N. D. 326, 27 L. R. A. (n. s.) 487, 124 N. W. 71.) Likewise, in *People v. Hall*, the supreme court of New York held that the exclusion of the public from certain classes of trials was a matter within the discretion of the court. (*People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 435.)

We submit that the so-called comments of the court upon the weight and credibility of the evidence and the so-called strictures upon counsel were not error, but were, as was held in *People v. Mayes*, 113 Cal. 618, 45 Pac. 861, the exercise of the proper function of the court in the conduct of the trial, especially when it is considered that the court gave cautionary instruction No. 5, and repeatedly admonished the jury as to the effect of his remarks.

Upon the proposition that there was no venue proved: The testimony relating to the *locus* of the crime shows that it was about half a mile north of the Reinelt house, located in section 24, T. 4 N., R. 7 E., and the homestead of Reinelt was described as the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  sec. 24. Reinelt further testified: "I sent the girls out to look for the horses; I sent them over on section 13 and they went right north from my place on to section 13, about a half a mile from my place." It is held that courts take judicial notice of public surveys and the manner in which townships are divided into sections. (*Harrington v. Gold-*

*smith*, 136 Cal. 168, 68 Pac. 594; *Albert v. City of Salem*, 39 Or. 466, 65 Pac. 1068; *Leadbetter v. Borland*, 128 Ala. 418, 29 South. 579; *Bowman v. Henry*, 142 Ala. 698, 110 Am. St. Rep. 55, 39 South. 92; *State ex rel. Arthurs v. Board*, 44 Mont. 51, 118 Pac. 804.) Hence, they must take judicial notice of the fact that section 13 does lie immediately north and adjacent to section 24 in any township, and since the description of Gallatin county in Chapter 60, Laws of 1913, includes section 13, the conclusion is inevitable that the section 13 referred to by Joseph Reinelt is in Gallatin county. This, we think, disposes of this assignment of error.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The appellant, convicted of statutory rape, assigns forty-three alleged errors, presenting seven different grounds upon which he claims the judgment should be reversed. These grounds we shall briefly consider in their order:

1. It is contended the information does not state a public offense because, though charging "rape under the age of consent," in that the appellant did on the day named willfully, unlawfully and feloniously have and accomplish an act of sexual intercourse with and upon the complaining witness, then and there a female under the age of eighteen years, to-wit, of the age of thirteen years, and not then and there the wife of the appellant, there was a fatal omission to charge an assault or to aver that the complainant was a human being. Counsel does not argue this matter very strongly, and we commend his discretion in that regard. The purpose of an information is to inform the accused of the nature and cause of the accusation against him. To do this it was not necessary in the present instance to allege an assault; and, as everyone else possessing rudimentary intelligence would know that "rape under the age of consent upon a female [naming her] not the wife," etc., necessarily implies a human being as the victim, we cannot assume that the appellant or his counsel were left in the dark

upon the subject. The information is sufficient. (*People v. Gilbert*, 199 N. Y. 10, 20 Ann. Cas. 769, and note 775, 92 N. E. 85.)

2. Complaint is made that the court received evidence of [2] other acts of intercourse between the appellant and the prosecutrix occurring within six weeks after the act relied on for a conviction. The admissibility of such evidence in cases of this character is not now open to question. (*State v. Harris*, 51 Mont. 496, 154 Pac. 198; *People v. Koller*, 142 Cal. 621, 76 Pac. 500.)

3. It is urged that the appellant was not given a fair and im-[3] partial trial because of some remarks by the district judge. We have considered all the instances specified, and find that the remarks complained of were elicited by the overzeal of appellant's counsel. We are unable to see that they were inappropriate under the circumstances. It may as well be understood that the trial judge possesses functions somewhat greater than those of a silent moderator, and that it is his right and his duty to see that the witnesses are protected from misrepresentation, that they are understood, and that the trial itself is conducted with reasonable expedition. We do not feel that the presiding judge abused that discretion in the present case.

4. Alleged undue restriction of the right of cross-examination is assigned. Only one instance is specified, and that instance relates to a matter which was wholly and manifestly immaterial.

5. The sufficiency of the evidence to justify the verdict is attacked solely upon the ground of failure to prove the venue. We think it barely possible to deduce from the testimony that the act occurred in Gallatin county as charged, but, since the cause must be remanded for a new trial, further consideration of this matter will be omitted.

6. Complaint is made of the refusal of the following instruction: "You are instructed that this class of prosecutions are at-[4] tended with great danger and afford an opportunity for the display of malice and private vengeance. Charges of this kind may be easily invented and maintained, and the jury are

cautioned of the danger of a conviction on the sole testimony of the prosecutrix. And if, after considering the testimony in the case, you have any reasonable doubt of the guilt of the defendant, then it is your duty to acquit the defendant." Without giving any reason or citing any authority, counsel contents himself with the statement that this instruction should be given in every trial for rape. We differ, and question its propriety in any case. The court's instruction No. 10 went as far as any cautionary instruction ought to go, and there is nothing in this record to warrant the suggestion that private malice or revenge were at all involved.

7. The giving of instruction No. 15 is urged as error, but upon the theory that other acts of intercourse than the one alleged were inadmissible. As this theory is wrong, the objection must fall.

8. The principal ground of complaint is that the defendant [5] was denied a public trial. This cause was brought to trial on November 19. On the morning of November 20 a jury was secured, and, when the first witness was called, the following proceedings took place:

"The Court: On account of the nature of the case the bailiffs are instructed not to allow any one else in the courtroom. Those who are in the courtroom now may remain until they get ready to retire, but after you once leave you cannot return, and no one else will be allowed to come in.

"Mr. Pease: We object to your Honor's excluding the public from a trial of this cause, and ask that your Honor admit all persons of mature age to witness the trial or to be present at this trial if they so desire.

"The Court: The request is denied. This rule is not meant, however, to apply to officers of the court and newspapermen. If the defendant wants the newspapermen in, let them in. I will except newspapermen; that is, if the defendant wants them; and, if he does not want them, we will let them stay out."

The trial was not concluded until November 21. In the minutes of the court for the 20th, approved and signed by the judge who made the order, is this recital:

"Upon application of the county attorney all persons except court officers, attorneys, doctors and reporters are excluded from the courtroom."

It would seem that the members of this court ought to be able to determine from this record whether a reasonable representation of the general public was or was not permitted to witness the trial. If necessary, we would assume that the court enforced the order as made; but the minute entry furnishes ample proof of that fact. We will not assume, however, that the spectators present when the order was made, on the morning of November 20, stayed in the courtroom continuously throughout the day, throughout the night following, and so much of the 21st as elapsed until the trial was concluded. The order recites that it was made "on account of the nature of the case." The order is inconsistent in itself. If there was anything in the nature of the action or in the evidence which might tend to corrupt the morals, it would seem that the same protection was due to those present when the order was made, as to others who might seek admission. Just why those then present were permitted to stay while others similarly situated were excluded is nowhere explained. In our judgment, the order was made capriciously, or it is to be treated as excluding the public from the trial for no other reason than that in the judgment of the court the evidence adduced would be unfit for people of mature age to hear. We are bound to accept the latter of these alternatives, and, though the motive which prompted the order may have been ever so worthy, the order itself is indefensible.

The Constitution declares that in all criminal prosecutions the accused shall have the right to a public trial. (Sec. 16, Art. III.) Just what is meant by a public trial has been the subject of some discussion; but, with a single exception, we undertake to say that no court of last resort in this country has ever sustained an order of the character of the one before us, when timely objection to it was interposed.

*People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433, by an intermediate court of New York, is cited to sustain the lower



court here. In making the order the court in that case said to counsel for the defendant: "If there is any person \* \* \* you desire to have in the courtroom for the protection of your client's rights, the court has no intention of excluding any such person." We are also informed in the opinion that: "During the trial persons were admitted on the suggestion of the defendant's counsel, and the court made it plain that any people the defendant desired to attend would not be excluded." Further in the course of the opinion the court said: "That the protection of a public trial must be given to every defendant charged with a crime is obvious. No court in this nation has ever held otherwise, so far as I am able to ascertain. That principle must be held unimpaired, but its retention does not entirely wrest from the trial judge the discretion to conduct the trial consonant with good morals, common decency, and in an orderly manner." Whatever else may be said of certain of the court's observations, the facts differentiate the New York case from the one before us.

In *Reagan v. United States*, 202 Fed. 488, 44 L. R. A. (n. s.) 583, 120 C. C. A. 627, the circuit court of appeals for the ninth circuit approved an order excluding the public from a certain trial for no other reason than as stated by the trial judge: "I believe many are here out of morbid curiosity; second, I feel that the jurors in the box can listen to the testimony better if not bothered by the people in the courtroom; and, in the third place, I am not feeling good myself this morning, and I can listen to the testimony of the witnesses and objections of counsel better than if I am bothered with noise in the courtroom." After referring to some of the authorities, the court of appeals disposed of the question and said: "We think the better doctrine is that it is not reversible error to exclude the spectators as was done by the order of the court in the case at bar, when there is no showing whatever that the defendant was prejudiced thereby, or deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him." Just how a defendant could show that he was prejudiced by an order excluding the public or that the presence of a particular

person or of the public could have been of advantage to him is not disclosed, and such reasoning has been condemned by the courts everywhere. With equal propriety the court might deny a defendant charged with a felony the right to a trial by a jury, and then insist that the defendant, found guilty by the court, must show prejudice by demonstrating that a jury would have reached a different result.

The Constitution guarantees to a defendant charged with [6] crime, whether innocent or guilty, a public trial, and when the right is denied him, he has not had a fair and impartial trial within the meaning of the Constitution, and all that can be required of him is that he make known the fact of the denial, and the law imputes prejudice.

The only decision by a court of last resort approving an order which had the effect of denying a public trial to a person charged with crime is to be found in *State v. Johnson*, 26 Idaho, 609, 144 Pac. 784. The order of the trial court was that: "During the trial of this case all spectators will be excluded from the courtroom." And in approving it the supreme court said: "In cases like the one at bar, where the evidence is of a very immoral and disgusting nature, we do not think the court erred in excluding the general public from the courtroom during the trial. Of course, the friends of the defendant who desired to be present and the officers of the court, including members of the bar, ought not to be excluded; but to exclude the general public who only have a curiosity to hear the revolting details of a rape case does not deprive a defendant of a public trial as provided by the Constitution and statutes above cited." If the trial court employs the term "spectators" in its common, ordinary acceptance, then any friend of the defendant present merely as a looker-on, an observer, or a witness to the proceedings was excluded in violation of the rule which the court announces, and there is nothing in the opinion to indicate that any different meaning was intended to apply. Who shall determine whether a spectator is drawn to the courtroom by idle curiosity or by interest? What test shall be applied and what shall con-

stitute interest sufficient to justify his presence? Why should an exception be made in favor of a friend of the defendant while the taxpayer, who is interested to know how the public servants—the judge, the county attorney, the sheriff, *etc.*—perform their work, is excluded? And why make an exception in favor of members of the bar who are not interested in the trial of the case. Is it because lawyers are presumed to be immune against the influence of testimony “of a very immoral and disgusting nature,” or is it because members of the legal profession enjoy some special privilege not open to the laymen? The bare statement of such propositions is their own refutation.

In *State v. McCool*, 34 Kan. 617, 9 Pac. 745, the court, at the instance of the county attorney, requested all ladies present to leave the courtroom, as the public prosecutor was about to refer to evidence “unfit for ladies to hear.” The alleged misconduct of the county attorney in making the request, and not the invasion of the defendant’s constitutional right by the court, was the ground of error assigned, and the opinion proceeds upon that theory, and does not discuss the question of constitutional law.

*Robertson v. State*, 64 Fla. 437, 60 South. 118, and *State v. Nyhus*, 19 N. D. 326, 27 L. R. A. (n. s.) 487, 124 N. W. 71, are sometimes cited as authority for excluding the public from the trial of a criminal case, but neither supports such doctrine. In the first case, court officers, witnesses, the jurors, attorneys, the parties and “all persons directly interested in the case” were allowed in the courtroom, while in the latter the jurors, officers of the court, attorneys, litigants and their attorneys, witnesses, and “any other person or persons whom the several parties may request to remain” were permitted to be present.

But, whatever may be said of these decisions or of the views entertained elsewhere, this court ought not to give to our own Constitution such a construction as will sterilize its most vital parts. Article III is popularly referred to as our Bill of Rights; but, if the power to annul its provisions is vested in the district courts, then the appellation is a misnomer. These

guaranties were not intended as mere glittering generalities, but to serve useful and practical ends. With equal propriety might the court have denied this defendant the right to bail, the right to counsel, the right to process to compel the attendance of witnesses in his behalf, or the right to trial by jury. It was never intended that these guaranties might be ignored, set aside or evaded.

The courts quite generally, though not uniformly, hold that this provision for a public trial is so far for the personal benefit of the accused that he may waive it, and that he does waive it by failing to object to the order of exclusion (*People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *Benedict v. People*, 23 Colo. 126, 46 Pac. 637; *Dutton v. State*, 123 Md. 373, 61 Atl. 417; *State v. Nyhus*, above), or by requesting the order himself. (*Carter v. State*, 99 Miss. 435, 54 South. 734.) The provision is to be given a reasonable construction. It is not to be assumed that it was intended to impose senseless or impossible conditions. When the authorities have made reasonable provision for a courtroom, complaint cannot be made that it has not seating capacity sufficient to accommodate the entire population of the county; nor can complaint be made of an order which closes the doors after the courtroom is filled. (*Myers v. State*, 97 Ga. 76, 25 S. E. 252; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *Jackson v. Commonwealth*, 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091; *Kugadt v. State*, 38 Tex. Cr. 681, 44 S. W. 989.) And this provision is to be construed with others. The same Constitution which guarantees a public trial creates the district courts of this state and clothes them with the powers necessary to preserve order and perform their allotted functions with becoming dignity and decorum, and therefore the exclusion of persons for disorderly conduct or because they impede the due administration of the law, is justifiable. (*Grimmett v. State*, 22 Tex. App. 36, 58 Am. Rep. 630, 2 S. W. 631; *Lide v. State*, 133 Ala. 43, 31 South. 953; *State v. Callahan*, 100 Minn. 63, 110 N. W. 342.) Upon the same principle the courts may protect themselves, their officers, litigants and interested parties,

from characters dangerous because of their disposition, their habits or physical condition. And it may be assumed that such courts have the power, upon altogether different grounds, to exclude minors under certain circumstances, though that question is not before us.

Whatever be the history of the origin of this guaranty, the [7] provision of our state Constitution is to be construed in the light of the conditions prevailing in Montana at the date of its enactment in 1889. (*State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589.) If a trial from which all are excluded except court, jury, witnesses, counsel, defendant and court officers, including a public stenographer who records the entire proceedings, constitutes a public trial, then this provision is meaningless, and does not guarantee anything; for it must have been understood by its framers and by the people who enacted it that the persons designated above would of necessity be in attendance upon the trial of every felony case at least, as the constituents of the judicial machinery then recognized by law. It must be that the framers of our fundamental law understood that, in order for a trial to be public, the attendance cannot be limited to those persons whose presence would be necessary in order to conduct the trial. It has always required something more than this to constitute a public trial, and to this fact our legislatures have added emphasis.

Long before the Constitution was adopted the statutes declared: "The sittings of every court of justice shall be public except as provided in the next section." (Sec. 544, First Div., Comp. Stats. 1887.) The one exception mentioned the trial of an action for divorce. (Sec. 545, First Div., Comp. Stats. 1887.) In 1895 the exception was broadened to include as well the trials of actions for criminal conversation, seduction and breach of promise of marriage (secs. 100, 101, Code Civ. Proc. 1895), but all within the exception are civil actions; and this legislative declaration is subject to the rule, "*Expressio unius exclusio alterius*." The Constitution has declared for public trials in criminal cases, and the legislature has said, in effect,

that except in the civil actions enumerated, the doors of the courtroom shall be open during all the sittings of the court, and that the power does not exist anywhere to exclude from the courtroom any one *sui juris* who comes into the presence of the court when there is accommodation for him, and who conducts himself in a becoming manner.

In our judgment, the purpose of this constitutional provision is threefold. Primarily it is for the benefit of the accused—to afford him the means of proving a fact with reference to some question of procedure which it may become necessary for him to prove in order to protect his rights, and to see that he is not unjustly condemned. (*State v. Osborne*, 54 Or. 289, 20 Ann. Cas. 627, 103 Pac. 62.) But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff and clerk—conduct the public's business. As was said by the supreme court of California: "In this country it is a first principle that the people have the right to know what is done in their courts." (*In re Shortridge*, 99 Cal. 529, 37 Am. St. Rep. 78, 21 L. R. A. 755, 34 Pac. 227.)

"The right to have the courts open is the right of the public." (*State v. Copp*, 15 N. H. 212.) But the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end. (Cooley's Const. Lim., 2d ed., 441.) To the credit of our courts it may be said that the question before us has seldom arisen, but, when it has, the authorities with singular unanimity have upheld the right guaranteed by the Constitution, and have given such construction to the guaranty as vitalizes it and makes it of practical, not merely theoretical, value. (*People v. Murray*, 89 Mich. 276, 28 Am. St. Rep. 294, 14 L. R. A. 809, 50 N. W. 995; affirmed in *People v. Yaeger*, 113 Mich. 228, 71 N. W. 491; *State v. Osborne*, above; *State v. Hensley*, 75 Ohio

St. 255, 116 Am. St. Rep. 734, 9 Ann. Cas. 108, 9 L. R. A. (n. s.) 277, 79 N. E. 462; *Tilton v. State*, 3 Ga. App. 59, 62 S. E. 651; *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153; *Williamson v. Lacey*, 86 Me. 80, 25 L. R. A. 506, 29 Atl. 943.)

Because of the error committed in denying the defendant a public trial, the judgment and order are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SANNER: I find myself unable to assent to the reversal of this case. Assuming, for the moment, that the order of exclusion was indefensible, the mere making of it would not be reversible error in the absence of a showing that it was so enforced as to actually invade the appellant's right to a public trial; and, deeming the minute entry to be nothing more than the clerk's version of the order itself, the terms of which appear at large in the trial proceedings, I can discern no such showing in this record.

The section of our Constitution in which the right to a public trial is recognized (sec. 16, Art. III) deals with rights which are to obtain "in all criminal prosecutions," and these rights, stated as *in pari materia* and without restriction, except as to the place of trial, are to be considered in the same way. They are to be taken as without restriction, or each is to be construed with reference to its origin, to the protection it was meant to afford, and to the conditions annexed to its observance. That some of them cannot be taken as without restriction is conceded everywhere, this state included. The right to meet the witnesses face to face is not absolute, but is subject to certain exceptions, such as dying declarations, documentary evidence and testimony given on a previous hearing of the same cause by a witness who has since died or left the jurisdiction (129 Am. St. Rep. 23 *et seq.*); the right to process to compel the attendance of witnesses may be limited as to the number of such witnesses,

and is limited in all cases by the state line so far as compelling their attendance is concerned; the right to a speedy trial is uniformly interpreted to require the accused to wait until information or indictment can be filed, until the prosecution has had a reasonable time to prepare its case, and until the court and public officers can, without extraordinary efforts, diligence, or exertion, get around to its consideration (*United States v. Fox*, 3 Mont. 512; *State v. Conrow*, 13 Mont. 552, 35 Pac. 240); and, finally, the right to an impartial jury is held to mean a jury composed of persons whose impartiality, as measured by legal standards, has been established by legal means, and not persons who are without any psychological unfitness.

That the right to a public trial is to be similarly treated and cannot be applied "in all criminal prosecutions" follows from the admission that occasions may arise when the accused, though in no wise responsible, may have to submit to a partial or a total exclusion of the general public, as, in the cases cited approvingly above, where the judge has lost control of his audience (*Grimmett v. State*), where the audience applauds (*Lide v. State*), where the mere presence of the audience, though orderly, tends to embarrass the prosecuting witness so that she cannot tell her story (*State v. Callahan, supra*). It is also suggested, and I think with reason, that under certain other circumstances trial courts may exclude minors, doubtless because, as stated by Cooley, "a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity." (Const. Lim., 7th ed., p. 441.) But minors are certainly a part of the public, and the difference in intelligence, in moral susceptibility, and in capacity to be of benefit by his presence is not noticeably less in a person the day before than it is the day after he attains majority.

The essence of the matter, as I see it, is that courts, charged with the administration of justice, are engaged in moral conservation of the highest order and rest under no obligation whatever to become centers of moral infection in order that the trial



may be said to be public, any more than they rest under the obligation to make extraordinary efforts to take up the trial in order that it may be said to be speedy. This provision of our Constitution is simply a reiteration and application to this state of the like provision found in the Sixth Amendment to our national Constitution. It had its origin in an age when stenographers were unknown; when newspapers were few and under restrictions. The abuses of secret or "star chamber" proceedings conducted for political ends caused its formulation, and its object is to prevent a recurrence of such abuses. It ought not to be made an avenue for the escape of obvious guilt in a case which bears no sort of resemblance to these conditions, where, protected by the stenographic record, the newspapers, and the presence of such persons as were permitted to remain, no chance for secrecy was possible.

To my mind, the order for which this cause is to be reversed was a proper one, based upon grounds far more tenable than any inability or indisposition of a judge to preserve order in his courtroom. The record shows that the testimony was demoralizing in character, and that the presiding judge knew it would be so, from the trial of a companion case just concluded. Apart from those occasions when the maintenance of order or the protection of the accused himself requires the courtroom to be cleared, there is authority as well as reason for the view that the right to a public trial is not infringed if from a regard to public morals and public decency such an order is made in a proper case, and this is particularly true where the order is not absolute and does not result in a secret trial, "notwithstanding that those persons whose presence could be of no service to the accused and who would only be drawn thither by a prurient curiosity are excluded altogether." (Cooley's Const. Lim., 7th ed., 441; *Benedict v. People*, 23 Colo. 126, 46 Pac. 637; *Reagan v. United States*, 202 Fed. 488, 44 L. R. A. (n. s.) 583, 120 C. C. A. 627; *State v. Johnson*, 26 Idaho, 609, 144 Pac. 784; *People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433; *State v. McCool*, 34 Kan.

617, 9 Pac. 745; *Robertson v. State*, 64 Fla. 437, 60 South. 118; *State v. Nyhus*, 19 N. D. 326, 27 L. R. A. (n. s.) 487, 124 N. W. 71; *People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849.)

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FOWLIE, RESPONDENT, v. CRUSE ET AL., APPELLANTS.

(No. 3,756.)

(Submitted March 22, 1916. Decided April 12, 1916.)

[157 Pac. 958.]

*Slander—Repetition—Malice—Punitive Damages—Wealth of Defendant—Principal and Agent—Detectives—Declarations—Inadmissibility—Damages—Evidence—Privileged Communications—Waiver—Instructions—Good Character—Presumptions.*

**Trial—Error—Rendered Harmless During Progress of.**

1. Error committed during a trial which is rendered harmless during its progress, and therefore cannot prejudice the complaining party, is insufficient to impeach a judgment.

**Slander—Repetition—Malice.**

2. The repetition of slanderous words at different times is a sufficient showing of malice to entitle plaintiff to recover punitive damages.

**Same—Punitive Damages—Wealth of Defendant.**

3. The wealth and social standing of defendant charged with slander may be looked to by the jury in determining the punitive damages to be assessed.

**Same—Principal and Agent—Declarations—Admissibility.**

4. Declarations of the agent relating to the business for which he is employed, and explanatory of his acts, when proceeding within the scope of his authority, are deemed to be the declarations of the principal, and are competent evidence to bind the latter; otherwise not.

**Same—Detectives—Inadmissibility—Declarations of Agent.**

5. Defendant in an action for slander had employed detectives to obtain information relative to the whereabouts of articles of jewelry thought by him to have been stolen by plaintiff, a hotel-keeper. They, in conversations with plaintiff, repeated defendant's words in effect charging the former with theft. Plaintiff was permitted to testify to these declarations. *Held* prejudicial error, under the rule *supra*.

[As to slanderous statements relative to personal or business affairs, see note in 104 Am. St. Rep. 143.]

**Same—Damages—Evidence—Proper Rebuttal.**

6. Plaintiff, a hotel-keeper, having introduced evidence to the effect that after the alleged slander, her daily income from her business had

decreased substantially, it was error to deny defendant the right to show in rebuttal that during the same time the business of other hotels of the same class likewise declined, as tending to establish that the loss suffered by plaintiff was properly attributable to causes foreign to the alleged wrong.

**Same—Privileged Communications—Waiver.**

7. By making the slanderous statement in the presence of a stranger, defendant removed the bar of privilege otherwise attending communications made by him to his agents only, which might have protected him, in the absence of actual malice. (Rev. Codes, sec. 3604.)

**Same—Instructions.**

8. Instruction to the jury that in order to find for plaintiff the proof must show that defendant uttered the words made the basis of an action for slander, or "substantially similar words," held not prejudicially erroneous.

**Same—Instructions—Technical Terms—Proper Rule.**

9. In formulating instructions, courts should employ terms and expressions which have been approved generally as technically correct.

**Same—Instructions—Good Character—Presumptions.**

10. An instruction that, in the absence of evidence to the contrary, the law presumes that the plaintiff in an action for slander possesses a good reputation, held proper under section 8026, Revised Codes.

*Appeal from District Court, Lewis and Clark County, in the First Judicial District; J. A. Matthews, Judge of the Fourteenth District, presiding.*

ACTION by Lizzie O'Connor Fowlie against Thomas Cruse. Judgment for plaintiff. Pending motion for new trial, defendant died, and Richard Cruse and others administrators with the will annexed, were substituted in his stead. From the judgment and an order denying said motion, defendants appeal. Reversed and remanded.

*Messrs. Walsh, Nolan & Scallon*, for Appellants, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

A demurrer was interposed to the complaint on the ground that two causes of action were improperly united, the first predicated on injuries to character, the second, as we contend, predicated on injuries to person. (*Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56; *Bowman v. Wohlke*, 166 Cal. 121, Ann. Cas. 1915B, 1011, 135 Pac. 37; *Green v. Davies*, 182 N. Y. 499, 3 Ann. Cas. 310, 75 N. E. 536; *De Wolfe v. Abraham*, 151 N. Y. 186, 45 N. E. 455; *Tandy v. Riley*, 26 Ky.

Law Rep. 993, 82 S. W. 1000; *Martin v. Mattison*, 8 Abb. Pr. (N. Y.) 3.) The improper uniting of two causes of action in the complaint is not waived by the defendant submitting to trial of issues where objection on this ground is previously raised by demurrer. (*Thelin v. Stewart*, 100 Cal. 372, 34 Pac. 861.)

The defendant could not be held liable for any repetition of the statement by others, even by an agent without proof that the agent or other person had instructions to repeat or republish alleged slander, or else that he was acting within the general scope of his authority. (*German Sav. Bank v. Fritz*, 135 Iowa, 44, 109 N. W. 1008.)

The alleged statement was privileged. (*Morton v. Knipe*, 128 App. Div. 94, 112 N. Y. Supp. 451, 453; *Railway Co. v. Brooks*, 69 Miss. 168, 30 Am. St. Rep. 528, 13 South. 847; *Taylor v. Chambers*, 2 Ga. App. 178, 58 S. E. 369; *Edwards v. Kevil*, 133 Ky. 392, 134 Am. St. Rep. 463, 28 L. R. A. (n. s.) 551, 118 S. W. 273; *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 26 L. R. A. (n. s.) 1080, 121 S. W. 100; *Bohlinger v. Germania Life Ins. Co.*, 100 Ark. 477, Ann. Cas. 1913C, 613, 36 L. R. A. (n. s.) 449, 140 S. W. 257; *Nichols v. Eaton*, 110 Iowa, 509, 80 Am. St. Rep. 319, 47 L. R. A. 483, 81 N. W. 792; *Richardson v. Cooke*, 129 La. 365, 56 South. 318; *Briggs v. Brown*, 55 Fla. 417, 46 South. 325; *Hansen v. Hansen*, 126 Minn. 426, L. R. A. 1915A, 104, 148 N. W. 457; *Hoover v. Jordan*, 27 Colo. App. 515, 150 Pac. 333; *Adams v. Cameron*, 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286.)

By an instruction the jury were told that the plaintiff might recover if the defendant had spoken the words charged in the complaint, "or substantially similar words." This is not correct law. It was necessary for the plaintiff to prove the exact words or words of exactly the same meaning. (*Sanford v. Gaddis*, 15 Ill. 228; *Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119; *Fox v. Vanderbeck*, 5 Cow. (N. Y.) 513.)

The question of malice in connection with a civil action for libel was exhaustively considered by the supreme court of Cali-

fornia in *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530. The repetition of the statement to Keys and Garrity would also be privileged, and would not prove malice. (*Hayden v. Hasbrouck*, 34 R. I. 556, 42 L. R. A. (n. s.) 1109, 84 Atl. 1087; *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L. R. A. 129, 82 N. W. 887.)

Messrs. E. A. and Frank E. Carleton, for Respondent, submitted a brief; Mr. E. A. Carleton argued the cause orally.

The following authorities support our contention that the causes of action were properly joined in the complaint: *White v. Cox*, 46 Cal. 169; *Brewer v. Temple*, 15 How. Pr. (N. Y.) 286; *Harris v. Avery*, 5 Kan. 146; *De Wolfe v. Abraham*, 6 App. Div. 172, 39 N. Y. Supp. 1029; 23 Cyc. 414, 415; 1 Ency. Pl. & Pr. 188.

Whatever an agent does in the course of his employment the principal is liable for, if injury results, and, therefore, the acts and declarations of the agents and representatives spoken and done in the course of their employment are the acts and declarations of the principal, and are just as competent and proper as if the words were spoken or the acts done by the principal himself. The very method by which agency is proved supports this contention. "Agency may be proved by circumstantial evidence. Great latitude is allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may be inferred." (10 Ency. of Evidence, 21.) Such testimony as to the admissions of the defendant is a part of the *res gestae* in the case, and, hence, competent. (*Lowry v. Harris*, 12 Minn. 255.)

Were the agents in this case general or special agents? Were the statements made by them to plaintiff, to the effect that defendant had uttered and published the defamatory words complained of, made while they were in the pursuance of the work for which defendant employed them? They were general agents within the rules of law, and, being about their master's business, acting within the apparent scope of their authority, the statements

were competent. The statements were made incident to their employment. (*Maier v. Randolph*, 33 Kan. 340, 6 Pac. 625; *Atchison, T. & S. F. R. Co. v. Randall*, 40 Kan. 421, 19 Pac. 783; *Voegeli v. Pickel Marble & Granite Co.*, 49 Mo. App. 643, 645; *Rounds v. Delaware L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Electric Power Co. v. Metropolitan Telep. etc. Co.*, 75 Hun (N. Y.), 68, 27 N. Y. Supp. 93; *Faber v. Missouri Pac. Ry. Co.*, 116 Mo. 81, 20 L. R. A. 350, 22 S. W. 631; *Douglass v. Stephens*, 18 Mo. 362; *Gilmartin v. Mayor etc. of New York*, 55 Barb. (N. Y.) 239; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36; *New Orleans etc. R. Co. v. Bailey*, 40 Miss. 395.) The question whether or not the employee was within the scope of his employment is for the jury. (*Hoffman v. New York etc. R. Co.*, 46 N. Y. Super. Ct., 14 Jones & S. 526; *Rounds v. Delaware L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Brunner v. American Tel. & Tel. Co.*, 160 Pa. St. 300, 28 Atl. 690.) Upon this question of whether he was so acting within the scope of his authority, the finding of the jury is conclusive. (*Schulte v. Holliday*, 54 Mich. 73, 19 N. W. 752.)

Stress is laid upon the fact that the defendant did not expressly authorize the statements and declarations of these agents. It is wholly immaterial that he did not do so. "Even though the making of statements or declarations may not have been expressly authorized, they may be authorized by implication, because they are the natural and ordinary incidents of the position which the agent occupies." (2 Mechem on Agency, 2d ed., sec. 1780; *Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809.) All the acts and declarations of the agents with reference to the statement that the defendant had accused plaintiff of stealing the jewelry were competent as *res gestae*, and they were also competent as original evidence, being the acts and declarations of the defendant himself.

The statements were not privileged even as to the witness Keys. Falsely charging the commission of a crime to anyone unnecessarily is never privileged. (*People v. Detroit P. etc. Co.*, 54 Mich. 457, 20 N. W. 528; *Pierce v. Oard*, 23 Neb. 828,

37 N. W. 677; *Lynch v. Febiger*, 39 La. Ann. 336, 1 South. 690, 692n; *Rainbow v. Benson*, 71 Iowa, 301, 32 N. W. 352; *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 33 N. W. 181.) "Whenever a person deliberately adopts a method of communication which gives unnecessary publicity to statements defamatory of another, the jury will be justified in finding malice." (Newell on Slander and Libel, 2d ed., 531.)

Where the words charged in the declaration imputed lewdness and adultery to the plaintiff, and the words proved established that and no more or less, not by proof of equivalent words, but by proving the substance of the words spoken, it was held to be sufficient though the words were not proved precisely as charged in the declaration. (See *Thomas v. Fischer*, 71 Ill. 576; *Crotty v. Morrissey*, 40 Ill. 477; *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Dufresne v. Weise*, 46 Wis. 290, 1 N. W. 59; *Boldt v. Budwig*, 19 Neb. 739, 28 N. W. 280; *Posnett v. Marble*, 62 Vt. 481, 22 Am. St. Rep. 126, 11 L. R. A. 162, 20 Atl. 813.)

In such cases as this express malice, entitling the plaintiff to an award of exemplary damages, may be inferred from the circumstances of the particular case. (*Templeton v. Graves*, 59 Wis. 95, 17 N. W. 672; *Bergmann v. Jones*, 94 N. Y. 51.) Malice is inferred from failure to make suitable and reasonable inquiries. (25 Cyc. 51.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff herein alleges as a first ground of recovery that when the wrong complained of was committed, she had, for six years, been conducting the Fowlie Hotel in the city of Helena; that she had been well and favorably known to the traveling public, bearing a good name for honesty and uprightness; that Thomas Cruse, the defendant, was one of the most wealthy and influential citizens in the city of Helena; that Mary Margaret Cotter, his daughter, lately deceased, was the owner of a large amount of valuable jewelry; that she was an intimate friend of plaintiff and had been in the habit of visiting her at the Fowlie Hotel;

that because of plaintiff's kindness to her she had given plaintiff an imitation pearl necklace worth about \$5, and also two sets of earrings worth about \$4; that about the same time she had left with plaintiff other jewelry of the value of \$10; that in the early part of October, 1913, the said Cruse, referring to the jewelry which had belonged to his daughter, falsely, wickedly and maliciously, in the presence of J. N. Keys and other persons, spoke and published of and concerning the plaintiff these words, "I knew Mrs. Fowlie had stolen the jewelry"; that by the speaking of these words the said Cruse injured the plaintiff's good name and fame, greatly impairing her hotel business, in that many persons, because of their belief in the truth of the words, withdrew their patronage.

Repeating the matters alleged by way of inducement in the first cause of action, the plaintiff, as a second ground of recovery, alleges that in September, 1913, the said Cruse illegally and maliciously, intending to injure the plaintiff in her good name and character which she had theretofore borne as a hotel proprietress, initiated and undertook a campaign against her, by which he endeavored, by artifice, intimidation and intrigue, and through the agency of detectives, to compel her to give up the jewelry; that for the more ready accomplishment of this purpose, these agents went to the hotel of plaintiff and by the aforesaid means, and in pursuance of their unlawful purpose, frequently suggested that plaintiff had stolen the said jewelry; that all these acts caused the plaintiff much worry, mental pain, anguish and suffering, and greatly impaired her business, for that many persons, learning of the aforesaid malicious acts, ceased to patronize plaintiff, so that she was brought into hatred, contempt, and public infamy; that to further said malicious design and purpose, in September, 1913, the said Cruse assembled a mob of detectives at the courthouse in the city of Helena to make an entrance into plaintiff's hotel, to intimidate, frighten and overawe her, and thereby to compel her to surrender possession of the jewelry; and that, hearing of this, she became greatly frightened and alarmed, thereby being caused to suffer great



pain, anguish and humiliation. Judgment is demanded upon each cause of action for the sum of \$25,000.

To the first cause of action the defendant demurred on the ground of uncertainty, and to the complaint as a whole on the ground that there were improperly joined therein a cause of action for injury to character, and one for injury to the person. The demurrer having been overruled, the defendant answered, denying that the slanderous words were spoken and that defendant had done any of the acts alleged in the second cause of action. The trial resulted in a verdict and judgment for plaintiff on the first cause of action for \$7,500, the jury finding for the defendant on the second. Pending his motion for new trial, defendant Cruse died, and the persons who are now defendants, being the executors of his will, were substituted in his stead. The cause is before this court on appeals from the judgment and from an order denying a new trial. For convenience, Cruse will be referred to as the defendant.

1. It is contended that the court erred in overruling the demurrer to the complaint on the second ground thereof. As the [1] judgment must be reversed for reasons hereafter stated, it will not be necessary to classify the second cause of action, or to consider the contention made by counsel. By failing to move for a new trial and to prosecute an appeal, plaintiff elected to abide the result of the trial. So far as we can ascertain from the record by the aid of counsel's argument, the rulings of the court on questions of evidence offered in support of the second cause of action did not, in any wise, prejudice defendant during the trial under the first. In view of this condition, we think the error, if error it was, was harmless. While it is true, as counsel contend, a defendant does not waive the error in such a ruling by submitting to a trial on the merits after he has interposed his objection by demurrer, it does not follow that he is entitled to impeach the judgment because of the error, when by the course of events during the trial it becomes harmless. The second cause of action was by the verdict of the jury eliminated from the case; and, as it is not made apparent

that prejudice was wrought in the final result, the contention must be overruled. (Rev. Codes, sec. 6593; *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035; *Vreeland v. Edens*, 35 Mont. 413, 89 Pac. 735.)

2. It is argued with much earnestness that the evidence is insufficient to justify the verdict. The trial in the district court consumed fourteen days. The testimony of the witnesses in narrative form covers more than 600 pages. This is accounted for in part by the fact that there had been litigation between defendant and some of the witnesses in this case for alleged services performed by them at his instance as detectives, in an effort to gain information as to the whereabouts of some of Mrs. Cotter's jewels, which they represented to be of the value of from \$40,000 to \$60,000. Some of the principal witnesses had testified during the course of this litigation. The depositions of some of them had been taken by way of precaution for use in the case at bar. On both occasions the witnesses were examined and cross-examined at great length. Much of the testimony theretofore given found its way into the record through the efforts of counsel for defendant to impeach them, by showing contradictory and inconsistent statements touching the utterance of the slanderous words imputed to the defendant. Again, counsel on both sides went to unusual lengths in examining and cross-examining them, not only as to matters relevant and material, but also as to matters of no evidentiary value whatever. It is surprising that the patience of the trial judge was not taxed to the breaking point early during the course of the proceedings. We shall not undertake to examine these narratives and sift from the mass of them those parts which the jury must have accepted as disclosing truthfully what was said and done by the actors during the greater part of the year 1913, covered by the alleged investigations of the witnesses.

The defendant was a man of wealth, and prior to his death had been engaged in banking and other business in Helena and other parts of Montana. His daughter, Mrs. Cotter, was the owner of a number of articles of valuable jewelry which she had

deposited with various persons as security for loans or for safe-keeping. In May, 1913, she was absent from the state. The witness Mrs. Stevens having heard from the witness Keys, as she said, that Mrs. Cotter had left some of her jewelry, supposed to be worth many thousands of dollars, with some person in Helena, went to defendant and informed him of what she had heard, and offered to introduce him to the witness Keys, who could give him definite information on the subject. Having gained his permission to do so, she took Keys to defendant's house and introduced him. Keys denied having any definite information, but professed to be able to find a man who could give it to defendant. The latter agreed to pay him for the information. He also agreed to stand responsible for anything that was right for the purpose of securing witnesses necessary to enable him to gain possession of the jewelry. This witness and Mrs. Stevens paid several other visits to the defendant's home, during which the whereabouts of the jewelry, as well as the character and value of it, was discussed. On one occasion the witness Garrity, who had joined Keys in his investigations, went with them. On the occasion of one of these visits, according to their story, upon being informed that plaintiff had in her possession several articles of jewelry belonging to Mrs. Cotter, including those described in the complaint, defendant made the statement to them, first, that he believed that plaintiff had stolen the articles, and then, as alleged in the complaint, that he knew that she had stolen them. The latter statement was thereafter repeated in their presence and that of Garrity. The two first were the only witnesses who testified to hearing the slanderous statements; Garrity denying that he was present when any of them were made. There are many discrepancies and inconsistencies in the statements of these witnesses as to the particulars of the several conversations,—so many, indeed, that one's credulity is taxed to the utmost limit to accept them as true.

So, also, there were contradictory and inconsistent statements made by some of the other witnesses, rendering it questionable

whether they spoke the truth. Even so, it was the exclusive province of the jury to ascertain whether they did, notwithstanding these contradictions and inconsistencies. Such being the condition, it is not within the province of this court to say, as a matter of law, that the jury, and the trial judge who reviewed their findings on the motion for a new trial, reached a conclusion wholly without foundation in the evidence. We must concede that the evidence is unsatisfactory—so much so that if it had been submitted to us in the first instance, we should have been inclined to reach a different conclusion—yet this attitude of mind does not authorize us to disregard the rule applicable to all cases in which the verdict is based upon conflicting evidence, viz., that on appeal to this court the finding of the jury must be accepted as conclusive. On the whole case, we cannot say that the jury were not justified in finding that the slanderous words were uttered as alleged, and that they were false and unprivileged. Hence a *prima facie* case was made under the statute (Rev. Codes, sec. 3603, subd. 1), which the defendant was bound to meet and rebut with his proofs. It does not follow that the jury were wrong in refusing to accept the denial upon which the defendant rested his defense as conclusive. There was also evidence sufficient to justify submission to the jury of the question whether the slanderous [2, 3] words were prompted by malice, and hence whether the plaintiff was entitled to recover punitive damages. This was supplied by the repetition of the charge against the plaintiff at different times subsequent to the first publication, or in the conversation with Keys and Mrs. Stevens, and by the wealth and social standing of defendant. (*Downs v. Cassidy*, 47 Mont. 471, Ann. Cas. 1915B, 1155, 133 Pac. 106.)

3. During his investigations in his effort to ascertain who had possession of the articles in question, Keys associated with himself the witnesses Roberts and Chatfield; he also sought the assistance of Duncan, the sheriff of Lewis and Clark county. Later the witness Lechner, a priest of the Catholic church, took part in the investigation. It is questionable whether he had

authority of any kind from the defendant; he certainly had no authority from Keys; he never had any communication with the defendant. He stated that he acted solely through motives of gratitude toward the defendant because he had been a very liberal contributor to the church. Assuming to act for the defendant, he employed John Murphy, a detective, to aid him in gaining information as to the whereabouts of the jewelry. Still later the witness Carroll was authorized by a written order from the defendant to take possession from the plaintiff. Meanwhile, and until the jewelry was finally given up by the plaintiff during the course of litigation touching the probate of Mrs. Cotter's will, it was supposed to be of great value. At different times the plaintiff submitted to interviews by the persons named, other than Lechner. To some of them she exhibited the jewelry; to others she refused to exhibit it. She always claimed that the necklace and earrings had been given to her by Mrs. Cotter. The other articles she expressed herself as ready at any time to surrender to Mrs. Cotter upon demand, and, after her death, to any person authorized by law to demand them. During the trial Keys was permitted to testify, over defendant's objection, that in one of these interviews plaintiff asked Garrity if defendant had said that she had stolen the property, and that Garrity replied, "These are the very words that he used." Chatfield, on the solicitation of Roberts, went to the hotel to see the jewelry. He was permitted to testify that plaintiff told him that she was accused of stealing it, and that she thereupon said to him that it was the first time in her life that she had been accused of stealing. In a conversation between plaintiff and Duncan, plaintiff asked him if the defendant charged her with stealing the jewelry. Duncan replied, "Yes." Miss Fowlie, the daughter of the plaintiff, and Mrs. Howard, who heard the conversation, were permitted to rehearse it to the jury. Plaintiff testified to similar declarations made to her by Murphy. She was permitted to give other testimony of the same character. The contention is made that the action of the court in admitting this evidence was prejudicial error.

This contention, we think, should be sustained. The theory of the court was that, inasmuch as the witnesses were ostensibly the agents of the defendant to ascertain the whereabouts of the articles in question, any declarations made by them, or any of them, during the performance of their service were within the apparent scope of the employment, and were provable as the declarations of the defendant himself.

That for wrongs committed by the agent while acting within [4, 5] the scope of his authority, the principal is liable there can be no question. The rule is too well settled to require the citation of authority in support of it. It is also a rule, equally well settled, that the declarations of the agent relating to the business for which he is employed, and explanatory of his acts, when proceeding within the scope of his authority, are deemed to be the declarations of the principal, and are competent evidence to bind the principal. (*Callahan v. Chicago, B. & Q. Ry. Co.*, 47 Mont. 401, and cases cited, 47 L. R. A. (n. s.) 587, 133 Pac. 687.) It is not sufficient, however, that the particular declaration was made by the agent. It must have been made in connection with the discharge of the duty which he has been employed to perform and explanatory of it; and, though it may assume the form of narrative, yet if it is naturally and spontaneously prompted by the act itself, or naturally incident to it, it becomes a part of it and is competent. Now, accepting the testimony of Keys and Stevens as to the purpose of Keys' employment (their testimony is all there is to which we may look to ascertain the scope of Keys' duty), and, assuming that he was authorized to employ Duncan, Garrity, Roberts and Chatfield to assist him in the performance of it, we find that their employment was only to obtain information as to who was in possession of the jewelry and the character of the possession. None of them testified that he was employed to demand possession, Carroll admittedly being the only one who was authorized to make such a demand. If all of the declarants be regarded agents of the defendant for the purpose stated by Keys, none of their declarations were provable under the rule.

None of them were charges made by the agents, but were all reports to plaintiff as to what the defendant himself had said at some time prior to the interviews in which they were repeated to her. The statement of Garrity was drawn from him by the inquiry of plaintiff, and was not induced by anything which Keys or Garrity were then engaged in doing. It was a mere hearsay repetition of a past event. The statement of Chatfield was a rehearsal of plaintiff's own statement that she heard of the slander, and her expression of feeling on the subject. Duncan's statement falls into the same category with that of Keys, and the declarations of the other witnesses disclosed to the jury in the same way. Tested by the rule above referred to, they were not the statements of defendant, nor were they uttered under circumstances such as to render them confirmatory of plaintiff's own story under either cause of action. They were doubtless regarded by the jury as confirmatory of the story told by Keys and Stevens as to what occurred in their interview with the defendant when, as they said, defendant uttered the slanderous words charged. Whether defendant uttered the slander or not, he did not employ the witnesses to repeat it; hence they were solely responsible for their repetition and for such injury as may have resulted therefrom, if indeed they could have any injurious result. (Newell on Slander and Libel, 3d ed., 300, sec. 257; Odgers on Libel and Slander, 5th ed., 177.) The error was obviously prejudicial, and because of it the defendant is entitled to a new trial.

Evidence was offered by the plaintiff, and admitted without [6] objection, which tended to show that during the latter part of 1913 and the early months of 1914, the daily income from her business decreased substantially in amount. This was supplemented by plaintiff's books, a transcript from which was introduced in evidence. In rebuttal, defendant offered evidence to the effect that during the same months the business of other hotels of the same class showed a similar decline. This was excluded upon objection by plaintiff that the books of these hotels were the best evidence. This was error. It was competent to

show by anyone who had knowledge on the subject what the general condition of the business was, as tending to establish the fact that the loss suffered by the plaintiff was properly attributable to causes wholly foreign to the alleged wrong of the defendant.

4. It is contended that the words, if uttered by the defendant, were privileged, in that they were communicated only to the [7] agents, and that proof of actual malice was necessary to make out a case under the statute. (Rev. Codes, sec. 3604.) Without stopping to consider the question whether, if the statements had been made to Keys and Garrity only, they would have been privileged, but assuming that they would have been, the defendant himself removed the bar of privilege by making the statement in the presence and hearing of Mrs. Stevens, who was not employed by him for any purpose. So far as she was concerned, she was a stranger. Besides this, the subsequent repetitions of the charge in the presence of this latter witness was proof tending to show actual malice. (*Downs v. Cassidy, supra.*) The case of *Cooper v. Romney*, 49 Mont. 119, Ann. Cas. 1916A, 596, 141 Pac. 289, is not in point. What was said therein had reference to a publication *prima facie* privileged.

These remarks incidentally dispose of the contention that the court erred in submitting certain instructions to the jury on the subject of malice, and in refusing others requested by defendant.

5. Error is assigned upon the giving of the following instruction: "The court instructs the jury that before the plaintiff [8] is entitled to recover any verdict in this case, she must prove by a preponderance of the evidence that the defendant uttered and spoke of and concerning the plaintiff the words charged in the complaint, or substantially similar words, and that such words were spoken by the defendant in the presence of or hearing of some person or persons other than the plaintiff." The criticism of it is that the expression, "substantially similar words," does not embody a correct statement of the law. There is no question on the evidence but that if the defendant uttered



any slander at all, it was expressed in the words alleged in the complaint. Therefore the jury could not have found that other similar words were used. This being so, the instruction as given could not have prejudiced the defendant. The rule recognized by the authorities is that material words essential to make out the imputation charged must be proved substantially as alleged. (Newell on Slander and Libel, 3d ed., sec. 963.) Under the statute, a variance is not to be deemed material unless it has actually misled the adverse party to his prejudice. (Rev. Codes, sec. 6585.) This provision applies to this class of cases as well as to all others. Under the rule embodied in it, proof of similar words which in their scope and meaning make the same imputation as the words alleged ought to be deemed sufficient. If this is so, the instruction could not have resulted in prejudice. In legal effect, the expression employed by the court imports the same idea as the expression "substantially the same." In formulating instructions, however, it [9] is always advisable to employ terms and expressions which have been approved generally by the courts as technically accurate.

6. Error is assigned upon the giving of this instruction: "You [10] are instructed that the law presumes, in the absence of evidence to the contrary, that plaintiff possesses a good character and reputation." There was no error. On this subject Mr. Newell says: "The law presumes the character of the plaintiff to be good until it is attacked, and he can safely rest upon that presumption. As long as it is not assailed, there is no comparative degree of good, better, best in his character. \* \* \* But the general rule has reference only to cases where reputation is not a material issue, or where it has not been attacked. The reason for it is in the absence of any usefulness in proving that which the law already assumes." (Newell on Slander and Libel, 3d ed., sec. 933.) The rule thus stated is established by statute in this state. (Rev. Codes, sec. 8026.) This being so, it cannot be error to so instruct the jury.

We have not undertaken to notice all of the fifty-four assignments of error. The foregoing suggestions will, we think, be sufficient to guide the court at the next trial.

The judgment and order are reversed and the cause is remanded for a new trial upon the first cause of action.

*Reversed and remanded.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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THE BANKING CORPORATION OF MONTANA, APPELLANT, v. HEIN ET AL., RESPONDENTS.

(No. 3,780.)

(Submitted March 23, 1916. Decided April 12, 1916.)

[156 Pac. 1085.]

*Deeds of Trust—Mortgages—Redemption—"Right of Redemption"—"Equity of Redemption"—Burden of Proof.*

Deeds of Trust—Mortgages—Right of Redemption.

1. The provisions of sections 6813-6847, Revised Codes, governing the right of redemption, apply as well to a decree enforcing a deed of trust as to one foreclosing a mortgage.

Same—"Equity of Redemption"—Definition.

2. The "equity of redemption" from a mortgage or trust deed sale is a substantive property right which the mortgagor retains and which may be sold or seized on attachment or execution; it comes into existence when the property is hypothecated, and is terminated by a sale, either under a power of sale or by virtue of a decree.

Same—"Right of Redemption"—Definition.

3. The "right of redemption" arises only upon such sale, exists for the period fixed by law, and is not property in any sense, but a bare personal privilege of statutory origin to be exercised only by the persons named in the statute in the instances mentioned therein, and within the time and upon the conditions prescribed.

Same—"Right of Redemption"—Limited to Judicial Sales.

4. The right of redemption referred to in the statute *supra* relating to redemptions is limited to judicial sales; hence it has no application to a sale by virtue of a power contained in a mortgage or deed of trust.

Same—Right of Redemption—Burden of Proof.

5. The right of redemption being statutory, the burden is upon anyone, claiming by or under it, to show its existence, and that he is in a position to invoke its benefit.

[As to who may redeem, see note in 21 Am. St. Rep. 245.]

*Appeal from District Court, Teton County; J. B. Leslie, Judge.*

ACTION by The Banking Corporation of Montana against Joseph B. Hein and others. Judgment for defendants; plaintiff appeals. Reversed and remanded.

*Messrs. Day & Mapes*, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

*Messrs. Norris & Hurd*, for Respondents, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint herein is in the ordinary form employed in an action to quiet title. It alleges that the plaintiff is the owner and entitled to the possession of the property, and that the defendants claim an adverse estate or interest therein. Warren W. Hurd, and others claiming under him, made answer setting forth that the plaintiff's claim of title is based upon a deed executed by the defendant Joseph E. Hein, conveying the property to the plaintiff to secure a loan of \$50,000; that while the instrument purports to be a trust deed, it is in fact a mortgage, and contains a provision that in case of default in the payment of principal or interest, the trustee may proceed to sell to the highest bidder at public auction the property, rights, tenements and hereditaments thereby conveyed, or such parts thereof as may be necessary to pay the indebtedness then outstanding; that the defendant Hein defaulted in the payment of his indebtedness, and plaintiff proceeded to sell the property under the above-described power, and became the purchaser at the sale and executed to itself a deed therefor, which is the only claim of title that it has to the property; that the defendant Hurd and those claiming under him acquired their title by conveyance from Hein after the execution of the trust deed, but before the sale, and that the right of redemption conferred by law upon the defendant Joseph E. Hein and his successors in

interest had not expired at the time the suit was commenced; and that prior to the expiration of the period of redemption the plaintiff is not entitled to the ownership or possession of the premises. To that answer a general demurrer was interposed, but overruled, and plaintiff, refusing to plead further, suffered judgment to be entered against it and appealed.

If it became necessary to define the character of the writing in question, the difficulty would be all but insuperable. It has some of the characteristics of a deed creating an express trust to secure the payment and discharge of an indebtedness. It declares repeatedly that it creates a lien, and therefore it partakes of the nature of a mortgage with a power of sale. It confuses the idea of a deed of trust with the idea of a mortgage. It is a nondescript hybrid which fortunately need not be defined, further than to say that it is some sort of a conveyance for the security of an indebtedness, and contains a power of sale which was exercised in this instance.

Do the provisions of the Code governing the right of redemption [1] tion (secs. 6813-6847) apply to a sale under a power of sale contained in a mortgage or deed of trust? In *Hamilton v. Hamilton*, 51 Mont. 509, 154 Pac. 717, we reviewed at length the history of our statutory right of redemption, and reached the conclusion that the terms of section 6836 include a decree foreclosing a mortgage. In *Levy v. Burkle*, 2 Cal. Unrep. 778, 14 Pac. 564, it was held, and we think correctly, that the statute applies equally as well to a decree enforcing a deed of trust.

To determine the question before us it is essential that the [2] distinction between the equity of redemption and the statutory right of redemption be kept in mind. The distinction is not always recognized and our own Codes add confusion by the misapplication of terms. For instance: In section 5715 the "right of redemption" is mentioned, when in fact the subject treated is the equity of redemption considered further in sections 5723-5725. The equity of redemption is a substantive property right which the mortgagor retains in the property and which may be sold or seized on attachment or execution. It comes

into existence when the property is hypothecated, and is terminated by a sale either under a power of sale or by virtue of a decree. It had its origin in chancery, and was intended to temper the harshness of the common-law mortgage.

On the other hand, the right of redemption arises only upon [3] a sale, and exists for the period fixed by law. It is not property in any sense of the term, but a bare personal privilege. It is purely of statutory origin, and can only be exercised by the persons named in the statute, in the instances mentioned therein, and within the time and upon the conditions prescribed. (27 Cyc. 1799, 1800; *Powers v. Andrews*, 84 Ala. 289, 4 South. 263.)

An analysis of the statute above, which creates the right of [4, 5] redemption, defines its extent, prescribes its limitations, and provides the procedure for its enforcement, discloses at once that it is limited to judicial sales where the court is the vendor and the officer conducting the sale is merely the agent of the court; where there has been a judgment or decree of court (sec. 6813); an execution or its equivalent issued by the clerk of the court and directed to the sheriff for enforcement (sec. 6814); a levy (sec. 6827); due notice (sec. 6828); a sale at which the officer conducting it cannot be a purchaser (sec. 6830); written notice of redemption given to the sheriff, a duplicate filed with the county clerk (sec. 6839); payment; and the execution, delivery, and recordation of a certificate of redemption (sec. 6839). The right of redemption being statutory, the burden is upon anyone who claims by or under the right to show its existence, and that he is in a position to invoke its benefit.

A sale by virtue of a power contained in a mortgage or deed of trust is not a judicial sale, and does not bear any analogy to one. (*Kerr v. Blaine*, 49 Mont. 602, 144 Pac. 566.) The right to redemption does not attach to such a sale (27 Cyc. 1449), and for this reason the facts stated in the affirmative defenses—subdivisions 2 and 3—of the joint answer of the defendants Warren W. Hurd, Amy A. Hurd, Michael Hasquet

and E. Love, do not constitute a defense and the demurrer thereto should have been sustained.

The judgment is reversed and the cause is remanded, with directions to sustain the demurrer.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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KENNEDY, APPELLANT, v. ROGAN, ADMR., RESPONDENT.

(No. 8,621.)

(Submitted March 22, 1916. Decided April 12, 1916.)

[156 Pac. 1078.]

*Actions—Survival—Breach of Promise—Seduction—Executors and Administrators.*

1. Under section 6494, Revised Codes, an action for either breach of promise or seduction survives, and may be maintained against the administrator of the estate of defendant.

[As to notice of substitution after death of party, see note in 29 Am. St. Rep. 816.]

*Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.*

ACTION by Lizzie Kennedy against Hugh J. Rogan, as administrator of the estate of Patrick J. Rogan, deceased. Judgment for defendant and plaintiff appeals. Reversed.

*Messrs. Carleton & Carleton and Mr. Wm. T. Pigott, for Appellant, submitted a brief; Mr. Pigott argued the cause orally.*

*Mr. O. W. McConnell and Mr. Massena Bullard, for Respondent, submitted a brief; Mr. McConnell argued the cause orally.*

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from a judgment in favor of defendant upon his general demurrer to the complaint. There is some discussion in [1] the briefs of counsel as to whether the action is one for damages for a breach of promise of marriage or for seduction. It is not necessary on this appeal to determine the nature of it. The question whether it should be classified as the one or the other does not even remotely affect the merits of the appeal, since the only question submitted for decision—to adopt the language of counsel for defendant—is “whether any provision can be found in the statutes of this state under which an action, or cause of action, such as the plaintiff in this case seeks to assert, can be maintained against the personal representative of a deceased person.” The answer to this question is found in the first clause of section 6494, Revised Codes. The scope of this provision was considered, in the light of previous legislation on the subject, in *Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146, and again in the recent case of *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582. In the latter case Mr. Justice Holloway, referring to the former, said: “The history of our legislation upon the subject of abatement and revival was reviewed, and the conclusion was reached that in adopting the section in the language quoted above it was the intention to establish in this state a general survival statute. The remaining portion of section 6494 is adjective law. We are satisfied with that conclusion, and that the cause of action survives the death of the party in the wrong as well as the death of the one whose rights are infringed.”

Whatever difference of opinion may have existed prior to these decisions, further discussion of the subject must now be deemed foreclosed.

The judgment is reversed and the district court is directed to overrule the demurrer.

*Reversed and remanded.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

CONWAY, RESPONDENT, v. MONIDAH TRUST ET AL.,  
APPELLANTS.

(No. 3,635.)

(Submitted March 24, 1916. Decided April 17, 1916.)

[157 Pac. 178.]

*Personal Injuries—Parent and Child—Contributory Negligence.*

**Trial—Jury—Directing Verdict—Rule.**

1. No cause should be withdrawn from the jury, unless recovery cannot be had upon any view which may reasonably be drawn from the facts which the evidence tends to establish.

**Same—Undisputed Facts—Directing Verdict.**

2. Where the facts in a personal injury action are undisputed and such that reasonable men can draw but one conclusion from them, the case presents in effect an agreed statement of facts, and only questions of law determinable by the court.

**Personal Injuries—Parent and Child—Contributory Negligence of Parent.**

3. Where the parents of a seven year old child intrusted it to the custody of a person who took it to a place of known danger, i. e., an unguarded mining shaft, gave it no warning and permitted it to play about the mouth of the shaft until it fell into it and was injured, a *prima facie* case of contributory negligence on the part of the custodian—and hence of the parents—was made out, forbidding recovery of damages by the father, in the absence of evidence acquitting him of the imputation of negligence.

[As to imputing parent's negligence to child, see note in 110 Am. St. Rep. 281.]

**Same—Negligence—Custodian.**

4. Customary negligence in the matter of permitting children to play about open mining shafts in the vicinity of the place of the accident, could not exonerate plaintiff from the imputation of negligence.

**Same—Forgetfulness of Duty—Effect.**

5. Forgetfulness of his duty to the child intrusted to his care, brought about by his absorption in watching a passing train, did not constitute such an excuse on the part of its custodian as could exculpate plaintiff of the charge of contributory negligence.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by Joseph F. Conway, Sr., against the Monidah Trust, a corporation, and others. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Re-

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The question of unexplained presence of unattended child *non sui juris* in place of danger as *prima facie* evidence of negligence of parents is discussed in note in 16 L. R. A. (n. s.) 395.



versed and remanded, with directions to enter judgment for defendants.

*Mr. Joseph J. McCaffery* and *Mr. James E. Murray*, for Appellants, submitted a brief; *Mr. Murray* argued the cause orally.

The custodian was guilty of contributory negligence and assumed the risk of injury to the child. Such neglect on the part of the custodian, where the facts are conceded, constitutes contributory negligence and assumption of risk as a matter of law, and bars recovery. (*Harrington v. Butte A. & P. Ry. Co.*, 37 Mont. 169, 174, 16 L. R. A. (n. s.) 395, 95 Pac. 8.) A father has no right to expose a child to such dangers, and if he or a custodian of the child, who stands in the place of the father, so exposes the child to danger, there is a failure in the performance of this duty, which constitutes negligence. The security of the community, and especially of children, demands the assertion of this doctrine. (*Glassey v. Hestonville etc. Ry. Co.*, 57 Pa. St. 172; *Grant v. Fitchburg*, 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84; *Johnson v. Reading City Pass. Ry.*, 160 Pa. St. 647, 40 Am. St. Rep. 752, 28 Atl. 1001; *Westerberg v. Kinzua Creek etc. R. Co.*, 142 Pa. St. 471, 24 Am. St. Rep. 510, 21 Atl. 878; *Apsey v. Detroit etc. R. Co.*, 83 Mich. 432, 47 N. W. 319; *Atlanta & C. etc. Ry. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145, 26 L. R. A. 553, 20 S. E. 550; *Wolf v. Lake Erie etc. Ry. Co.*, 55 Ohio St. 517, 36 L. R. A. 812, 45 N. E. 708; *Pollack v. Pennsylvania R. Co.*, 210 Pa. St. 634, 105 Am. St. Rep. 846, 60 Atl. 312; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555; *Smith v. Hestonville etc. Ry. Co.*, 92 Pa. St. 450, 37 Am. Rep. 705; *Bamberger v. Citizens' St. Ry. Co.*, 95 Tenn. 18, 49 Am. St. Rep. 909, 28 L. R. A. 486, 31 S. W. 163; *Ploof v. Burlington Traction Co.*, 70 Vt. 509, 43 L. R. A. 108, 41 Atl. 1017.) The unnecessary exposure of plaintiff's child to known danger was in itself an act of negligence on the part of the custodian, which will bar recovery. (*La Fayette & Ind. R. R. Co. v. Huff-*

man, 28 Ind. 287, 92 Am. Dec. 318; *Pittsburgh etc. Ry. Co. v. Vining's Admr.*, 27 Ind. 513, 92 Am. Dec. 269.)

It seems to be the rule that a parent who brings an action in his own right for the death of his intestate will not be allowed to recover if his own negligence contributed to the death, in the absence of wanton negligence or willful injury on the part of the defendant; the reason assigned being that a person should not profit by his own wrong. (*Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 38 L. R. A. (n. s.) 754, 139 S. W. 301; *Scherer v. Schlager*, 18 N. D. 421, 24 L. R. A. (n. s.) 520, 122 N. W. 1000; 29 Cyc. 555.) A parent is responsible for the negligent and wrongful acts of the person to whom he intrusts the custody and care of his minor child. (*Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555.)

When the facts are undisputed and unquestionably disclose negligence on the part of plaintiff, it is the duty of the court to so declare as a matter of law. (*Colorado & S. R. Co. v. Reynolds*, 51 Colo. 231, 116 Pac. 1043; *Schultz v. Chicago etc. Ry. Co.*, 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321; *Johnson v. Rio Grande etc. Ry. Co.*, 19 Utah, 77, 57 Pac. 17; 29 Cyc. 631; *Molt v. Northern Pacific R. Co.*, 44 Mont. 471, 120 Pac. 809; *Zvanovich v. Gagnon & Co.*, 45 Mont. 180, 122 Pac. 272.)

*Mr. Peter Breen* and *Mr. H. K. Jones*, for Respondent, submitted a brief, and argued the cause orally.

The fact that Maddock, the custodian of the child, knew that there were holes upon the mining claim, and the fact that he took it thereon and allowed it to play for a moment or so, is not such misconduct as is prohibitory of the maintenance of this action (see cases cited in note 20, appended to section 327, 1 Thompson on Negligence; also section 321 *et seq.*); the fact that Maddock did not attend it for a minute or so does not preclude the right of recovery (see authorities last cited), and his thoughtlessness is not such an act as bars a recovery, as a matter of law,—it being a fact element which

the jury may take into consideration, with all the facts in the case in determining the question. (*Dan v. Citizens' St. R. Co.*, 99 Tenn. 88, 41 S. W. 339.) In order to charge Maddox with contributory neglect as a matter of law, his acts or omissions must have been a proximate or contributing cause of the injury (*Stewart v. Pittsburg etc. Copper Co.*, 42 Mont. 200, 111 Pac. 723), and from the facts the court could not so declare. His testimony is that he did not appreciate the danger, otherwise he would never have taken the children there; that at the time of the happening of the accident his mind was absorbed. The question of cause, as well as the question of neglect, under such circumstances was one wholly for the determination of the jury, and the jury having passed upon the misconduct alleged, adverse to appellants' view, the question is not subject to review. (*Dwyer v. Salt Lake City*, 19 Utah, 521, 57 Pac. 535; *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 37 L. R. A. (n. s.) 64, 73 S. E. 142; *Harrington v. Butte A. & P. Ry. Co.*, 37 Mont. 169, 174, 16 L. R. A. (n. s.) 395, 95 Pac. 8.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On the evening of July 19, 1911, Joseph F. Conway, Jr., age seven, and his sister, age six, by consent of their parents, were taken by Wm. Maddock on to the Tzarena mining claim, owned by the Monidah Trust and located near the limits of the city of Butte. While on the claim, Joseph F. Conway, Jr., fell into an unguarded shaft and was injured. The facts of the case are detailed at length in *Conway v. Monidah Trust*, 47 Mont. 269, L. R. A. 1915E, 500, 132 Pac. 26, and 51 Mont. 113, 149 Pac. 711—the case in which the child recovered damages for his own injuries. In this action the father seeks damages for the loss which he (the father) sustained by reason of the diminished earning capacity of the boy from the date of the injury until he should reach the age of twenty-one.

Upon the trial Maddock, the custodian of the child at the time of the accident, testified as a witness for the plaintiff. On

cross-examination he said: "I was familiar with that ground before I went out there, for three or four years. I walked ahead of the children about twenty feet or so; I couldn't exactly tell you right now. I knew that the shafts were there and open prior to that time. I went up and sat on the ledge of rocks and let the children play around picking flowers. I called to them to come up; my back was turned to them. The two of them was coming up at this time. They had been playing around there two or three minutes before I called to them. They were there for sufficiently long period of time to permit me to go up and sit upon the ledge of rocks and take out my pipe. I filled my pipe and lit it, and while I sat down for a smoke, I observed the train coming along, and at that moment I called for the children to come up. The children were down around these shafts during all the time it took me to do these things. They were about twenty feet or less than twenty feet north of this shaft when I called them. Of course, I didn't think they would run near the shaft. If I did, I wouldn't have brought them there at all. I never gave it a thought. I certainly knew the shafts were there. I walked all over that place several times, but was not giving it a thought at the time. My mind was absorbed for the time being in the Chicago & Milwaukee railroad train coming in, and I didn't give a thought to the danger that the children might encounter around these shafts. \* \* \* I remember at the last trial that the boy testified that he was picking flowers, and that he made a run to get a flower on the other side of the shaft, and that he wasn't running up there to see me at all. \* \* \* If he had observed where he was going, he would have seen and avoided the shaft. I knew that he was standing near the northeast corner of the shaft at the time I called to him. The shaft lay between me and the boy at the time I called for him; it was pretty near in line north; in a direct line between myself and the boy. He was a little shade to the east, and if he attempted to come directly to me, without going around the shaft, he would be in danger of running into the shaft. I knew that at the time I called him, but didn't give

it a thought; didn't think anything about the shaft. At the time I went there and left the boy around the shaft, I had complete knowledge of all these shafts being open and exposed there, and I certainly knew of the danger that the children might encounter with reference to falling down these shafts, but never did think anything about it. I wouldn't have gone there if I thought that."

The same witness further testified in answer to direct and leading questions by plaintiff's counsel, as follows:

"Q. Did you ever see anybody else up in that vicinity—children, men and women, and so forth?

"A. Oh, yes; there have been three or four go out Sundays and sit around there.

"Q. Men, women and children?

"A. Yes, sir. I see where they were picnicking—used to have fires out there or something. \* \* \*

"Q. You frequently saw other people—other parents and other children—there, doing just as you did with those children on that occasion, did you not, prior to this time and while those shafts were exposed and uncovered?

"A. Yes, sir.

"Q. Well, Mr. Maddock, did you ever see children playing, holding picnics, and building fires, and getting their dinners in the same place you and the children of Joseph F. Conway, the plaintiff here, were at that time?

"A. Well, I have seen children and grown-up people there. I see the places where they had made fires and built fires, but did not see them at times that I have been along."

The boy testified that he was running to pick a flower when he fell into the shaft; that he did not know of the existence of any shaft there, and was not warned by his father or Maddock.

At the conclusion of all the testimony the defendants moved for a directed verdict, upon the ground that the evidence disclosed contributory negligence which barred recovery. The motion was denied, and upon submission of the cause the court instructed the jury: "It is the duty of the father of an infant

child to use ordinary care and precaution to keep his child from places of danger, and if this duty has been delegated to others the father must assume responsibility for reasonable care on their part, and in this regard you are instructed that if you find from the evidence in this case that William Maddock, who had the custody of plaintiff's child at the time of the accident complained of, did not exercise ordinary care and prudence to protect said child from injury, then the negligence of such custodian, if any, is attributable to the father, and your verdict in such event must be in favor of the defendants and against the plaintiff."

From a judgment in favor of the plaintiff, and from an order denying them a new trial, defendants appealed.

"The rule is well established that no cause should ever be [1] withdrawn from the jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish." (*Nord v. Boston & Mont. C. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681.) But, except in cases of libel and slander, juries are the triers of facts only, and not the judges of the law; and where [2] the facts are undisputed, and are such that reasonable men can draw but one conclusion from them, the only questions presented for decision are questions of law, and to that extent the case presents in effect an agreed statement of facts. (*Helena Nat. Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.)

In *Harrington v. Butte, A. & Pac. Ry. Co.*, 37 Mont. 169, 16 L. R. A. (n. s.) 395, 95 Pac. 8, we considered at great length [3] the question presented, and announced the rule that the unexplained presence of a child *non sui juris*, unattended in a place of known danger, makes out a *prima facie* case of negligence on the part of the child's parents. That doctrine has never been modified or departed from. How much stronger, then, is the case where the parent is not merely passive, but actually takes a seven year old child to a place of known danger,

and, failing to give it any warning, sits by and permits the child to play about the known dangers until he is injured. The evidence establishes *prima facie* that Maddock was negligent, and the burden was then upon the plaintiff to acquit him of the attribution. In this he failed. Maddock will not be heard to say: "I was merely doing what a few other criminally negligent people did"; or, "I knew the danger, but I did not think about it." It is no excuse for the want of ordinary care that carelessness [4] is general about the matter involved or at the place of the accident. Custom never exonerates from the imputation of negligence. "The standard is not what men ordinarily do under like circumstances, but what reasonably prudent and careful men, having regard for the rights and safety of others, do under like circumstances." (*Kinsel v. North Butte Min. Co.*, 44 Mont. 445, 120 Pac. 797.)

This case does not bear any analogy to one where the person, [5] apparently delinquent has acted in an emergency, or failed to act because he was absorbed in the discharge of his principal duty. The evidence is uncontradicted, and the circumstances are unexplained and inexplicable, except upon the bald assumption that Maddock was so absorbed in his pipe and in watching a train that forgetfulness of the duty he owed to the helpless children was excusable. In *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, Mr. Justice Pigott in his inimitable style most forcefully stated the rule as follows, in a case where the facts were sufficiently alike those now before us to make the observations particularly pertinent: "The plaintiff cannot recover if he could have avoided the injury by exercising ordinary care and caution. That he may \* \* \* have temporarily forgotten the risk is of no moment; he was charged with knowledge and understanding of such dangers and risks as he might have comprehended and appreciated by using ordinary care; if he forgot, he was negligent, for he was bound to remember. The defendant was not required to take better care of the plaintiff than the plaintiff was of himself; the measure of the duty of each was ordinary care. The negligence of the defendant did

not dispense with the necessity of the plaintiff's using ordinary care. Such has been the unbroken rule since *Butterfield v. Forrester*, 11 East, 60, was decided, to the present day. By his own careless act in getting under the ledge without inspecting or sounding it, he voluntarily exposed himself to the risk of injury. The accident would not have happened had the plaintiff exercised due care and caution."

This leaves nothing further to be said. The evidence discloses negligence upon the part of plaintiff's custodian, without which the accident could not have occurred. Plaintiff must assume responsibility for that negligence and cannot recover. To permit recovery would be to reward him for his own wrongful act. The motion for a directed verdict should have been sustained.

The judgment and order are reversed, and the cause is remanded with directions to enter judgment in favor of the defendants for their costs.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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COBURN CATTLE CO., RESPONDENT, v. HENSEN ET AL.,  
APPELLANTS.

(No. 3,633.)

(Submitted March 25, 1916. Decided April 17, 1916.)

[157 Pac. 177.]

*Trespass—Livestock—Actual and Constructive Possession of  
Land—Title—New Trial—Insufficiency of Evidence.*

New Trial—Insufficiency of Evidence—When Proper.

1. Where, under the evidence in an action for trespass on land by driving sheep thereon for pasturage, the plaintiff was clearly entitled to a verdict in some amount, a verdict for defendants for nominal damages on a counterclaim which was unsupported by proof, was erroneous and a motion for a new trial was properly granted.



Trespass—Actual or Constructive Possession of Land Sufficient.

2. Actual or constructive possession is sufficient to maintain an action of the nature of the one referred to above.

Same—Title—When Record Evidence Required.

3. The rule that in an action for trespass on land plaintiff must, in order to prevail, tender record proof of title, applies only to cases in which he is not in actual possession, but is compelled to rely upon constructive possession under his record title.

[As to validity of statute authorizing land owner to seize and sell trespassing animals, see note in *Ann. Cas.* 1915C, 1263.]

*Appeal from District Court, Blaine County, in the Twelfth Judicial District; John A. Matthews, Judge of the Fourteenth District, presiding.*

ACTION by the Coburn Cattle Company against Louis Hensen and another, copartners doing business under the firm name and style of L. & P. Hensen. From an order granting plaintiff's motion for new trial defendants appeal. Affirmed.

*Mr. H. S. McGinley*, for Appellants, submitted a brief and argued the cause orally.

*Mr. Odell W. McConnell* and *Mr. John A. Tressler*, for Respondent, submitted a brief as well as one in reply to that of Appellants; *Mr. McConnell* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for trespass on land. The complaint alleges that at the time the wrong complained of was committed, plaintiff was in possession and entitled to the possession of lands situate in Blaine (now Phillips) county, a part of which it owns in fee, and the remainder of which it holds under leases; that defendants were copartners and were the owners of or chargeable with the care of about 10,000 head of sheep; that on July 26, 1911, the defendants, without plaintiff's consent and against its wishes, willfully and maliciously drove their sheep upon plaintiff's said lands, and from that date to and including August 3, 1911, held them in herd there, with the result that they ate off and destroyed the hay and grass growing thereon,

besides hay that had been harvested; and that plaintiff's lands were trampled and injured so that they became unfit for use as a winter range during that year. The prayer is for a judgment for \$5,000 compensatory, and \$2,500 punitive, damages. Denying all the material averments in the complaint, the defendants allege what they designate a counterclaim for damages, for that on August 3, 1911, while defendants' sheep were upon their accustomed range upon public lands of the United States, the plaintiff, through its officers and employees, took them by force and intimidation from the possession of defendants' herders who were in charge of them, and drove and scattered them, leaving them without herders, whereby many of them were lost or lamed, causing defendants an actual loss of \$1,193.30. Judgment is demanded for this amount, besides \$2,500 punitive damages. There was issue by reply.

At the trial the defendants recovered a verdict for nominal [1] damages and for costs. On plaintiff's motion an order was made granting it a new trial. The appeal is by the defendants from this order. The motion was made on several grounds, among them that the evidence was insufficient to justify the verdict. In his memorandum opinion accompanying the order sustaining the motion, the trial judge, after a brief review of the evidence, says: "It would seem, therefore, that the testimony would have justified and the jury should have found a verdict for the plaintiff, even though such verdict might have been for nominal damages only." He further remarks that there was no evidence to warrant or support a verdict for the defendants. This conclusion is fully justified by the record. The evidence tends to show that the plaintiff corporation had for many years been in the undisputed possession of the lands in controversy and using them for pasturage for its sheep and the cutting of the natural grasses growing thereon for hay for its own use and for market; that some of them the plaintiff owns, and upon others it has acquired the right of possession for pasture under leases from the owners or persons who have an inchoate title thereto under the laws of the United States; that some of them

are inclosed and others not; that during the time alleged in the complaint, the defendants wantonly and without excuse drove their sheep upon them, in some instances breaking the inclosures, and held them there despite repeated protests of plaintiff through its officers and employees. This evidence is not seriously controverted. On the other hand, there is no evidence to justify the conclusion that the agents and servants of the plaintiff took possession of defendants' sheep or did any of the acts alleged in defendants' counterclaim. Therefore the office of the jury was merely to ascertain the amount of damages plaintiff was entitled to recover. Under these circumstances the plaintiff was entitled to a new trial as a matter of right.

There was much conflict in the testimony of the witnesses as to the extent of the injury suffered by the plaintiff. On the whole, we think the amount claimed excessive. But nevertheless a case was made for the jury which justified a verdict in some amount. Whether it would have justified an award by way of punitive damages it is not now necessary to consider. Under no view of the case were the defendants entitled to recover upon their counterclaim.

It is earnestly argued by counsel for defendants that since [2] plaintiff did not tender record proof of title to any of the lands owned or held by it, except a small area, and the evidence does not disclose that any damage was done within this area, it wholly failed to make a case. In other words, counsel seeks to maintain the proposition that in this kind of a case plaintiff must recover upon the strength of his own title, and not upon the weakness of that of defendant. This proposition cannot be maintained. The gist of the action in trespass is the invasion by one of the possession of another. The general rule therefore is that either actual or constructive possession is sufficient to maintain the action. (*Noyes v. Black*, 4 Mont. 527, 2 Pac. 769; *McKay v. McDougal*, 19 Mont. 488, 48 Pac. 988; *Beaufort L. & I. Co. v. New River L. Co.*, 86 S. C. 358, 30 L. R. A. (n. s.) 243, and note, 68 S. E. 637; 38 Cyc. 1004.) The rule contended [3] for by counsel applies only to cases in which the plaintiff is

not in actual possession, but is compelled to rely upon constructive possession under his record title. Though the complaint alleges title, it is not necessary to show it by record evidence, if actual possession is shown, as here. (*Beaufort L. & I. Co. v. New River L. Co.*, *supra.*)

Doubtless the measure of damages will vary according to the circumstances of the particular case. We are not required, however, to consider and determine what items plaintiff is entitled to recover in this case.

We have decided this case upon the points submitted. Nothing said herein is to be understood as a recognition of a right in defendants to interpose in this case a counterclaim of the character of that alleged in their answer.

The order is affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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R. M. COBBAN REALTY CO., APPELLANT, v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO. ET AL., RESPONDENTS.

(No. 3,484.)

(Submitted March 25, 1916. Decided April 24, 1916.)

[157 Pac. 173.]

*Quieting Title—Reformation of Instruments—Estoppel—Trial—Inconsistent Theories—New Trial.*

Quieting Title—Trial—Inconsistent Theories—New Trial.

1. Where, on appeal from an order denying a new trial in an action to quiet title to a strip of land granted for a railroad right of way, neither counsel agreed with the other nor with the trial court as to the theory or theories upon which the cause was tried, and the

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Upon the question of estoppel against assertion of title or interest in real property against one making improvements thereon, see note in 48 L. R. A. (n. s.) 759.

two theories apparently adopted by the court—estopped *in pais* and mutual mistake in the description of the land in the deed—were contradictory of each other, a new trial *held* proper.

**Reformation of Instruments—Mistake—Mutuality.**

2. Suit to reform a deed does not lie where the alleged mistake in the description of the land was not mutual.

*Appeal from District Court, Missoula County; Asa L. Duncan, Judge.*

ACTION by R. M. Cobban Realty Company, a corporation, against the Chicago, Milwaukee & St. Paul Railway Company of Montana and another. There was a decree for defendants, and from an order denying it a new trial, plaintiff appeals. Reversed and remanded.

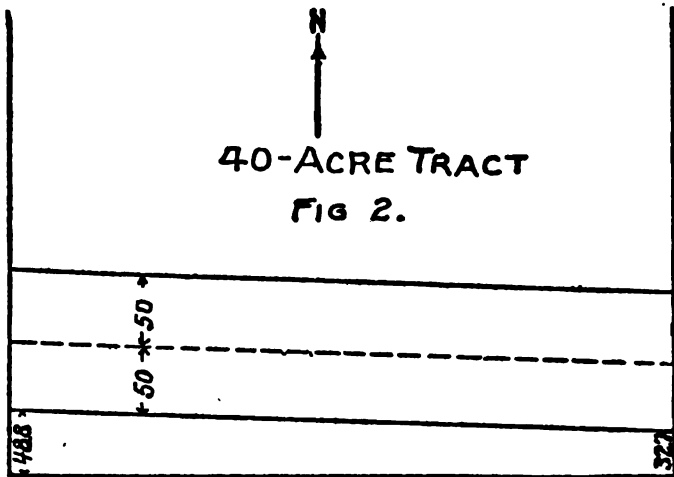
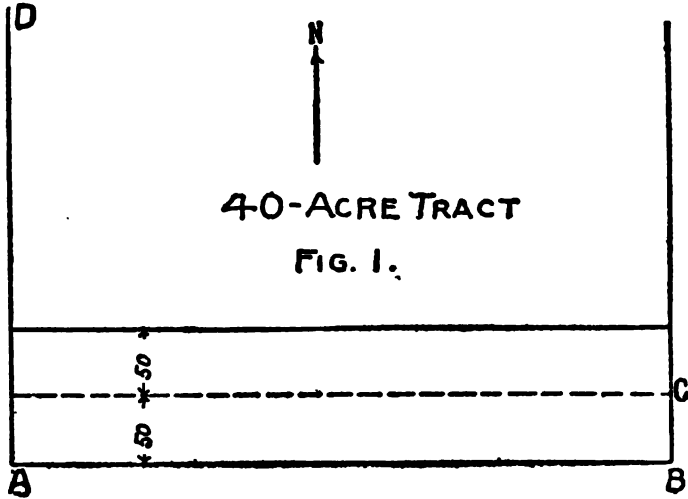
*Mr. Elmer E. Hershey*, for Appellant, submitted a brief and argued the cause orally.

*Mr. Henry C. Stiff*, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1907, when the Milwaukee road constructed its transcontinental line across this state, it became necessary to secure a right of way over the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of section 20, township 13 N., R. 19 W. (hereafter referred to as the forty-acre tract), 100 feet in width, fifty feet on each side of the center line as theretofore surveyed and staked upon the ground. The land sought was owned by the plaintiff, but the legal title stood in the name of E. B. Weirick, trustee. The right of way agent of the railway company presented to the plaintiff a map which had been prepared by the railway company's engineers, and which was supposed to illustrate the railway's desires and to locate the proposed right of way strip. Figure 1 of the subjoined diagram will represent that map for all the purposes of this appeal. The dotted line represents the center line as staked

upon the ground. The line A B is the south line of the forty-acre tract, and also the south line of the right of way strip.



Negotiations were carried on with reference to this map, and a purchase was made. When the deed was executed and delivered by Weirick to the railway company, it described the strip as beginning at the point C, where the center line of the right of

way, as staked upon the ground, intersects the east side line of the forty-acre tract, thence running south on that east line fifty feet to the southeast corner of the forty-acre tract, thence west along the south side line of said tract to what is marked on figure 1 as the line A D, thence north on that line 100 feet, thence east on a line parallel to and fifty feet north of the staked line to the east side line of the forty-acre tract, thence south fifty feet to the place of beginning. When the construction work was about completed, this controversy arose, and plaintiff instituted a suit to quiet title, making the constructing company, as well as the operating company, defendants. For brevity we shall treat the defendants as one company and refer to it as the railway company. The complaint is in the form usually employed in such an action.

The answer admits corporate existence, and denies all the other allegations of the complaint, except as such denial is modified by the affirmative defenses. The answer then undertakes to plead: (1) An equitable estoppel; and (2) a mutual mistake in the description contained in the Weirick deed. It asks for a decree that plaintiff be estopped to claim any of the right of way actually occupied by the railway company, and that the Weirick deed be reformed so as to describe the strip of ground upon which the railroad was constructed.

The reply is a general denial. Upon the trial the parties entered into a stipulation, the only apparently material portion of which follows: "That plaintiff now is, and during all the times in its complaint mentioned was, the owner of the lands described in said complaint, save and except as the ownership thereof was modified, changed or affected by the deed given to the defendant Chicago, Milwaukee & St. Paul Railway Company of Montana, and referred to in the answer of defendants, by E. B. Weirick, trustee, who at the time of giving the same was acting for and on behalf of plaintiff, and as such ownership may have been changed, modified or affected by the location, survey, staking out, construction and operation of the railroad mentioned in the answers of defendants, and the ownership of the roadbed and

right of way by defendants by reason of the acts done by defendants, or either of them, as may be shown on behalf of defendants in the trial of this cause."

Certain evidence, oral and documentary, was introduced, and the court then made findings of fact, and from them drew conclusions of law, upon which a decree favorable to the defendants was rendered. From an order denying it a new trial, plaintiff appealed.

The findings of the trial court are in very general terms, but were seemingly intended to cover both affirmative defenses. The conclusions of law are that plaintiff is not entitled to any relief, that it is estopped to claim any of the ground in controversy, and that the railway company is awarded a decree quieting its title.

Counsel for appellant in his brief concedes that he waived any [1] objections which he might otherwise have had to the sufficiency of the answer, but insists that the findings are not supported by the evidence, and that under the stipulation the trial court was called upon to construe the Weirick deed in the light of the intention of the parties and their acts, as shown by the evidence.

Counsel for respondents evidently proceeds upon the assumption that the construction of the deed was the only question before the lower court, for his brief is devoted entirely to the consideration of the rules which he insists should govern the proper construction of the deed. If the purpose of the stipulation was to eliminate any question of estoppel or mutual mistake, the trial court was clearly misled, for its findings, conclusions and decree indicate an entirely different understanding of counsel's agreement. The stipulation relieves the plaintiff of the necessity of deraigning its title, and shifts the burden of proof to the defendants; but if it has any further purpose, it is concealed somewhere in the language employed. If the trial court was correct in its findings upon the plea of estoppel, then the construction of the deed never entered into the court's determination, and no con-



sideration could have been given to the stipulation beyond what we have indicated.

If the plaintiff is estopped to assert any claim to the ground in dispute by reason of the fact that it stood by without objecting while the railway company expended large sums of money in constructing its road over ground not conveyed by the Weirick deed, then it is altogether immaterial what the original intention of the parties was, or what mistake there may be in the deed. On the other hand, if the Weirick deed correctly describes the right of way now occupied by the railway company, then there cannot be any element of estoppel in the case, for plaintiff could not complain that the company was laying its track upon the strip it had purchased for that purpose. So that, when the trial court found that plaintiff is estopped by its conduct, it impliedly found that the railway is occupying ground not conveyed by the Weirick deed, and that plaintiff should have complained before the situation of the railway company was so changed that it could not be restored to its *status quo*. But the evidence is insufficient to sustain the finding upon the plea of estoppel. The only evidence upon the subject is that when plaintiff complained to the railway company that it was not constructing its road upon the conveyed strip, it was met with the assurance that the road was being built upon the line illustrated by its right of way map (Fig. 1). And even upon the trial of this case, Healey, the engineer for the railway company who made the original survey and staked out the center line over the forty-acre tract and had charge of the construction work, testified for defendants that the road was constructed upon the center line as staked upon the ground; that he furnished the data, including the map from which the description in the Weirick deed was obtained; that he has since checked over the description in the deed against an actual survey of the ground, and that the description in the deed is "mathematically correct."

The court, however, did not rely altogether upon the estoppel, but apparently laid great stress upon the fact that it was the intention of the parties that the strip to be conveyed by the Wei-

rick deed should extend across the forty-acre tract fifty feet on each side of the staked center line, which the court finds was not located as described in the deed, and by the witness Healey, but was located upon the dotted line in Figure 2 above, and the decree quiets the railway company's title to the strip represented by the shaded portion of Figure 2. The effect of the decree is to reform the deed. The only evidence touching the intention of the parties, other than the recitals in the deed itself, was furnished by Jones, the active agent for the plaintiff in negotiating the sale. He testified that the sale was made with reference to the railway company's right of way map (Fig. 1) and upon the supposition that plaintiff's remaining interest would be in one compact body north of the right of way and not divided into two irregular parcels, as the decree leaves it.

It is not made plain who drew the deed, but it is established that the sale was made with reference to the map prepared by [2] the railway company, and that the description in the Weirick deed was obtained from data furnished by the agent of the railway company. If, then, there is a mistake in the description contained in the deed, it was not a mutual mistake, but the mistake of the railway company only, and one not known to the plaintiff at the time. Under these circumstances a suit to reform the instrument will not lie. It may be that the minds of the parties never met; but there was not a mutual mistake. (34 Cyc. 911; *Gaffney Merc. Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561, 562.)

Neither counsel agrees with the other, nor with the trial court, as to the theory, or theories, upon which this cause was tried, and each of the two theories apparently adopted by the court—estoppel *in pais* and mutual mistake—is contradictory of the other. The evidence would suggest, at least, that the only real issue tried was: Where is the south boundary line of the forty-acre tract? The evidence is insufficient to sustain the findings upon the affirmative defenses of estoppel *in pais* and mutual mistake. There is nothing in the record to suggest that the court's conclusion was based upon a construction of the Weirick

deed alone, while the finding upon the plea of estoppel is altogether inconsistent with any such supposition.

The order of the trial court is reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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HARRINGTON, ADMR., APPELLANT, v. BUTTE & SUPERIOR  
COPPER CO., LIMITED, ET AL., RESPONDENTS.

(No. 3,631.)

(Submitted March 24, 1916. Decided April 25, 1916.)

[157 Pac. 181.]

*Real Property—Deeds Absolute—Mortgages—Evidence—Insufficiency—Estoppel—Laches.*

Real Property—Deed Absolute—Mortgage—Evidence—Insufficiency.

1. In an action to have a deed absolute declared a mortgage, evidence held insufficient to meet the requirement of the rule under which the proof must be clear and convincing to warrant relief.

[As to deed absolute in form as mortgage, see note in 129 Am. St. Rep. 1137.]

Same—"Once a Mortgage, Always a Mortgage."

2. The rule of the maxim, "once a mortgage, always a mortgage," has application only to cases in which relief is sought by the mortgagor against the mortgagee himself or his grantee with notice.

Same—Title—Estoppel.

3. Where a mortgage is in the form of a deed absolute, and there is no written defeasance of record, one who becomes a grantee of the mortgagee without notice of the fact that the deed was intended as a mortgage, acquires title free from the lien, and the mortgagor is estopped by the deed from questioning the purchaser's title.

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Authorities on the question, does a deed absolute on its fact but intended as a mortgage, convey legal title, are gathered in a note in 11 L. E. A. (n. s.) 209.

A valuable note on the question of parol evidence that a written instrument which on its face imports a complete transfer of a legal or equitable estate or interest in property was intended to operate as a mortgage or pledge, will be found in L. E. A. 1916B, 18.

Same—Laches.

4. Where plaintiff, in an action to have a deed absolute in form decreed a mortgage, did not make any claim to the property for more than twenty-one years after the date of the instrument and until the only person conversant with the facts had died, his claim was barred by laches.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by Thomas J. Harrington, administrator of the estate of George W. Newkirk, deceased, against the Butte & Superior Copper Company, Limited, a corporation, and others. From a judgment for defendants and an order denying new trial, plaintiff appeals. Affirmed.

*Messrs. Maury, Templeman & Davies and Mr. James H. Baldwin*, for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. J. L. Templeman and Mr. D. Baldwin* argued the cause orally.

"A party having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due and before his right of redemption is foreclosed." (Sec. 5723, Rev. Codes; *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211.) "It is a maxim of law that, 'Once a mortgage, always a mortgage,' and the right of the mortgagor can only be extinguished by regular foreclosure and sale." (*Grover v. Hawthorne Estate*, 62 Or. 77, 114 Pac. 472, 121 Pac. 808.) "The right to redeem is favored by courts of equity, and it will not be allowed to be taken away except upon a strict compliance with the steps necessary to divest it." (*Caro v. Wollenberg*, 68 Or. 420, 136 Pac. 866, 869; *Beverly v. Davis*, 79 Wash. 537, 140 Pac. 696, 698; *Grover v. Hawthorne Estate*, 62 Or. 77, 114 Pac. 472, 121 Pac. 808, 814; *Fee v. Singly*, 6 Mont. 596, 13 Pac. 375, 376.)

Appellant's right is not barred by laches. The doctrine of laches is based upon equitable estoppel. (*Conaway v. Co-operative Home Builders*, 65 Wash. 39, 117 Pac. 716, 719.) It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of claimant's act, to permit

an unwarranted injustice. It looks to the peace of society and not to the punishment of the claimant, even if he has been negligent. Whether or not the doctrine applies depends upon the circumstances of each case. (*Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077; *Hudson v. Herman*, 81 Kan. 627, 107 Pac. 35.) It is never invoked in aid of a party where the equities are not in his favor. (*Harris v. Defenbaugh*, 82 Kan. 765, 109 Pac. 681, 683; *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077.) Or in favor of one who has not altered his condition. (*Parks v. Roth*, 25 Colo. App. 296, 137 Pac. 76, 78.)

Prejudice must be shown. Mere delay is not of itself laches, but delay that has worked an injury to another. (*Willis v. Nehalem Coal Co.*, 52 Or. 70, 96 Pac. 528; *Just v. Idaho Canal etc. Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381.) No such showing was made. Laches will not be imputed from delay alone. (*Parchen v. Chessman*, 49 Mont. 326, 340, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; *Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968.)

Respondents and their alleged predecessors in interest are presumed to know the law and to know that an attempted transfer of the property here in controversy under the circumstances disclosed by the record in this case could not pass the title to such property. (*Olson v. Stringer*, 60 Wash. 77, 110 Pac. 807; *O'Dell v. Montross*, 68 N. Y. 499; *Howe v. Carpenter*, 49 Wis. 697, 6 N. W. 357.)

Our contention is, under the circumstances of the evidence, that it was for the Beal heirs to show that the indebtedness and the mortgage securing same referred to in the probate records had reference to some other indebtedness and mortgage than the one in suit, and failing so to do, the trial court should have presumed that the indebtedness and mortgage referred to in the probate reports referred to plaintiff's indebtedness and mortgage in suit, and to nothing else. (*Blackmore v. Neale*, 15 Colo. App. 49, 60 Pac. 952; *Morrell v. Ferrier*, 7 Colo. 22, 1 Pac. 94; *Shipley v. Shilling*, 66 Md. 558, 8 Atl. 355; *Wilcox v. Clarke*,

18 R. I. 324, 27 Atl. 219; *Coles v. Kelsey*, 2 Tex. 541, 47 Am. Dec. 661.)

*Messrs. Kremer, Sanders & Kremer, Mr. Peter Breen, Mr. H. K. Jones, and Mr. John Lindsay*, for Respondents, submitted a brief; *Mr. Louis P. Sanders and Mr. Lindsay* argued the cause orally.

Where one appears of record to be the owner in fee of real estate, one alleging the contrary must prove the same by clear and convincing evidence. (*Swain v. McMillan*, 30 Mont. 433, 76 Pac. 943; *Mantle v. White*, 47 Mont. 234, 245, 132 Pac. 22; *American Min. Co. v. Basin & Bay State Min. Co.*, 39 Mont. 476, 24 L. R. A. (n. s.) 305, 104 Pac. 525; *Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473; *Falk v. Wittram*, 120 Cal. 479, 65 Am. St. Rep. 184, 52 Pac. 707; 27 Cyc. 1025; 8 Ency. of Evidence, 715.) "To convert a deed absolute on its face into a mortgage, the evidence should be clear, convincing and specific; of a character such as will leave in the mind of the chancellor no hesitation or doubt." (*Satterfield v. Malone*, 35 Fed. 445, 1 L. R. A. 35.) The courts go further, and hold that the testimony of a single witness is insufficient to overcome the defendant's denial in the absence of fraud or mistake. (*Arnold v. Mattison*, 3 Rich. Eq. (S. C.) 153; *Barber v. Lafavour*, 176 Pa. St. 331, 35 Atl. 202; *Strong v. Strong*, 126 Ill. 301, 18 N. E. 665; *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Blake v. Taylor*, 142 Ill. 482, 32 N. E. 401.)

"The old oft-quoted legal maxim, 'Once a mortgage, always a mortgage,' is undoubtedly to be read and considered with this limitation, 'Once a mortgage, always a mortgage' until the parties to it agree to treat it differently. But when they agree to treat it differently and do so treat it, it loses its character as a mortgage; one party ceasing so to treat it is not sufficient, but both parties so ceasing to treat it is sufficient no doubt." (*Richmond v. Richmond*, 20 Fed. Cas. No. 11,801; *Haggerty v. Brower*, 105 Iowa, 395, 75 N. W. 321.) "The doctrine 'Once a mortgage, always a mortgage' does not refer to future con-

tracts." (*Watson v. Edwards*, 105 Cal. 70, 38 Pac. 527; 27 Cyc. 974.)

"Where a deed absolute was intended as a mortgage and the party entitled to redeem sells to a third person and directs the holder of the deed to convey the premises to such purchaser, the latter takes title clear of the condition of the defeasance." (*Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592; *Minton v. New York El. Ry. Co.*, 130 N. Y. 332, 29 N. E. 319; *Wimmer v. Ficklin*, 14 Bush (77 Ky.), 193.)

Many considerations enter into a judicial determination as to whether or not laches may be imputed to a party, such as lapse of time, staleness of the demand, unexplained delay and other facts frequently asserted by courts to be sufficient to deprive a party of the right to relief under the circumstances. (*Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134, 12 Sup. Ct. Rep. 418; *Hough v. Coughlan*, 41 Ill. 130; *Brendel v. Strobel*, 25 Md. 395; *Walker v. Ray*, 111 Ill. 315; *Speidell v. Henrici*, 15 Fed. 753.) "Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver." (*Kelly v. McQuinn*, 42 W. Va. 774, 26 S. E. 517.) "Equity will not assist one who has slept on his rights and shows no excuse for his laches." (*Phillips v. Piney Coal & Coke Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1040, 44 S. E. 774.)

In *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 13 L. R. A. 137, 26 Pac. 203, which was an action in ejectment by the successor of the mortgagor against a mortgagee in possession, it was held: "It is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid." (*Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375; *Montgomery v. Trumbo*, 126 Ind. 331, 26 N. E. 54; *Post v. Bank of Utica*, 7 Hill (N. Y.), 391.)

"The intention of the parties to the deed at the time it was made is controlling. If, after the deed was made and the transaction completed, there existed no indebtedness from the grantor to the grantee on account of the consideration for the deed, it is

not a mortgage." (*Fridley v. Somerville*, 60 W. Va. 272, 54 S. E. 502; *Frink v. Adams*, 36 N. J. Eq. 485.) Again, it is fundamental in an action of this kind that it is necessary that the appellant establish the fact that the relation of debtor and creditor existed between the parties to the instrument. (*Rankin v. Rankin*, 111 Ill. App. 403; *Samuelson v. Mickey*, 73 Neb. 852, 103 N. W. 671, 106 N. W. 461; *Jones v. Jones*, 20 S. D. 632, 108 N. W. 23.)

"No conveyance absolute on its face can be a mortgage unless made to secure the payment of a debt or the performance of a duty." (*Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was originally brought by George W. Newkirk on September 12, 1912. Thereafter he died, and Thomas J. Harrington, his administrator, was substituted as plaintiff in his stead. The defendants, other than John R. Bordeaux and Butte & Superior Copper Company, Limited, are referred to in the pleadings as the heirs of George W. and Sarah J. Beal, husband and wife, both now deceased. What is the relationship of each to the other or to the deceased husband and wife is not important. For convenience, Newkirk will hereafter be referred to as plaintiff, and the Butte & Superior Copper Company, Limited, as the company. The other defendants, except Bordeaux, when reference to them collectively is necessary, will be designated as the defendants Beal. The defendant Bordeaux will be referred to by name.

The complaint herein sets forth the facts upon which plaintiff seeks relief in two counts. The first is in form an action to have a deed absolute, under which the defendants Beal claim title to the property described therein, decreed to be a mortgage, and the plaintiff declared to be entitled to redeem the property upon payment of the debt secured by it. The second is in form an action to quiet title. The case stated in the first count may be summarized as follows: That on June 30, 1890, the plaintiff



was the owner, in possession and entitled to the possession, of an undivided one-sixth interest in the Deadwood quartz lode mining claim situate in Silver Bow county; that he then became indebted to Sarah J. Beal in the sum of \$1,000, the indebtedness being evidenced by a promissory note bearing that date; that to secure the payment of this indebtedness he executed and delivered to defendant Bordeaux, a deed which, though absolute in form, was intended by plaintiff, Sarah J. Beal, and defendant Bordeaux, to be a mortgage only, and to serve no other purpose; that the defendants Beal are now the owners of said interest, but subject nevertheless to plaintiff's right as mortgagor; that the company claims a right to and interest therein under a contract between it and the defendants Beal, by the terms of which it is entitled to purchase the said interest from the defendants Beal for the sum of \$25,000, payable, \$2,500 in cash on August 7, 1912, the date of the execution of the contract, and the balance in specified installments; that prior to the execution of the contract none of the defendants Beal ever claimed to be the owners or encumbrancers of the interest otherwise than subject to the right of plaintiff as mortgagor; that plaintiff has paid a portion of his indebtedness but does not know the amount of it still due; that he is ready and willing to pay the balance when the amount of it shall have been ascertained; and that since the execution of the contract held by the company, the grantors therein—the defendants Beal—have denied and do now deny plaintiff's right, and allege that they have never held the interest otherwise than as owners thereof in fee. The prayer demands that an accounting be directed to ascertain the balance due from plaintiff, and that upon payment of it by plaintiff, the defendants Beal be decreed to convey the interest to him.

The second count alleges that the plaintiff is the owner of the interest, that defendants assert some claim thereto adverse to the plaintiff, and that such claim is without right. The prayer demands that the defendants be required to disclose fully the nature of their claim, and that it be declared without foundation. The answer of defendant Bordeaux admits that on June 30,

1890, the plaintiff was the owner of the property in controversy. He denies all the other material allegations in the first count of the complaint. He alleges affirmatively that prior to June 30, 1890, he had loaned to the plaintiff approximately the sum of \$200; that at that time in order to secure payment of the amount, plaintiff executed and delivered to him a deed to the property in question, which, though absolute in form, was intended to be a mortgage only; that the deed was duly recorded on July 2, 1890; that it was understood and agreed between him and the plaintiff, when the deed was executed and delivered, that whenever plaintiff should repay the amount so loaned to him, this defendant would execute to the plaintiff such reconveyance or conveyance as he might request; that on November 12, 1890, the plaintiff having in the meantime discharged the loan, at the request of the plaintiff and in accordance with defendants' agreement, Bordeaux and his wife executed and delivered to plaintiff a deed absolute in form, running to Frank Bateman and his wife, Isadora Bateman, grantees, which was duly recorded on November 21, 1890; and that at no time thereafter did he claim, nor does he now claim, any interest in the property. His answer to the second count is in substance the same.

The company filed a separate answer, which does not require special notice. The interest it claims in the property is as assignee of a contract between defendants Beal and A. B. Wolvin and John M. Hayes, entered into on August 7, 1912, embodying these agreements: The Beals agreed to convey to the latter the property for the sum of \$25,000, as stated in the complaint. They were to deposit a deed in the First National Bank of Butte, with instructions for its delivery to Wolvin and Hayes, or their assignee, upon the payment of the agreed price. At the time the contract was executed, the deed was deposited and the cash payment made. When this situation was disclosed at the trial, it was agreed by plaintiff, the company, and the defendants Beal, that in case he should succeed in the action he would be bound by the terms of the contract, that he would accept the balance

of the purchase money due and deposit a deed with the clerk, to take the place of the deed of the defendants Beal when the action should be determined. The cash payment already made was to be accepted by defendants Beal as a discharge of plaintiff's debt. The plaintiff thereupon deposited his deed with the clerk. The company, though represented by counsel, took no further part in the proceedings.

Though Perry H. Beal filed a separate answer, the defenses interposed by all the defendants Beal to both causes of action were in effect the same. These were denials of the material allegations of the complaint, and affirmative defenses which included the statute of limitations, adverse use, laches and estoppel. Upon all of these affirmative defenses there was issue by reply. The court made elaborate findings and conclusions of law in favor of the defendants, and judgment was entered accordingly. The plaintiff has appealed from the judgment and an order denying him a new trial.

In brief, the court found these to be the facts: On June 30, 1890, the plaintiff, being the owner of the property in controversy, executed and delivered to defendant Bordeaux a deed to it, absolute in form, for an ostensible consideration of \$1,000. This deed was intended as a mortgage to secure to Bordeaux the payment of about \$200 theretofore loaned to plaintiff by him. No other writing was executed, but it was orally agreed that when the debt should be discharged, Bordeaux would execute and deliver to plaintiff such reconveyance or conveyance as plaintiff should request. This deed was recorded two days thereafter. On November 12, 1890, the plaintiff, having discharged his indebtedness to Bordeaux, prepared and presented to him for execution by himself and wife a deed naming Frank Bateman and his wife, Isadora, grantees, and reciting a consideration of \$1,000. He informed Bordeaux that he had sold the property to Bateman and desired to have the conveyance made directly to Bateman and wife in order to save the expense of a second deed, which would be necessary should the conveyance be made directly to plaintiff. This deed was thereupon executed by Bor-

deaux and wife and delivered to plaintiff, and by plaintiff to Bateman. It was put upon record on November 21, 1890. On December 22, 1893, Bateman and wife conveyed the property for a consideration of \$1 to Louella N. Newkirk, as guardian of the person and estate of Sarah J. Beal, who was then insane. The court found no evidence showing that on June 30, 1890, the plaintiff was indebted to Sarah J. Beal in any sum, or that on that date the plaintiff executed to her a note for \$1,000, or any other sum. On December 31, 1890, the plaintiff, together with the defendants George W. and Maybell U. Beal (now Doering), husband and daughter of Sarah J. Beal, executed their joint and several note to Frank Bateman, the guardian of Sarah J. Beal, for the sum of \$1,000, payable in installments of \$200 per month, with interest at one per cent per month; this being the note referred to in the complaint as the one which the deed to Bordeaux was intended to secure. The court specifically found that the Bordeaux deed was not executed to secure this note, but that the facts in relation to it were as heretofore stated. It found specifically that the transaction between the plaintiff and Bateman and wife was a sale, and that the latter thereby became the owners of the property. It further found that on December 22, 1893, under the conveyance by Bateman and wife to Louella N. Newkirk, the defendants Beal became the owners of the property in controversy, and since that time have claimed to be, and have been, the owners of it, free from any claim thereto by the plaintiff or any other person whomsoever; that none of them had any knowledge of the claim now asserted by the plaintiff until the bringing of this action.

As an aid to an understanding of the references made in the foregoing synopsis to the estate of Sarah J. Beal, these admitted facts are pertinent: The property in controversy was not occupied or worked either by plaintiff or defendants Beal. Who paid the taxes does not appear. When plaintiff executed the deed to Bordeaux, Louella N. Newkirk was his wife and joined him therein. She was divorced from him in December, 1894. At the time of the various transactions recited, Sarah J. Beal

had for several years been insane. Bateman was the guardian of her person and estate until January 23, 1893, when he resigned his office. On January 28 he was succeeded by defendant Louella N. Newkirk, who took her oath of office on that day. She continued thereafter to act as guardian until the death of Sarah J. Beal, which occurred on May 4, 1900. She rendered her final account and was discharged on February 29, 1904. On November 4, 1901, defendant Perry H. Beal was appointed administrator of the estate of Sarah J. Beal. George W. Beal, the husband, died testate on June 8, 1901. Perry H. Beal was appointed executor of his estate on July 8, 1901. It appears only by inference that these estates have been fully administered and distributed. Since no question is made that the defendants Beal, the heirs of the husband and wife, are *prima facie* the owners of the property in controversy, we may assume that distribution has been made. It may be stated, further, that in none of the exhibits of the estate filed in the district court by either guardian, subsequent to the date of the deed to Bateman and wife, during the continuance of the guardianship, was the property in question listed as the property of Sarah J. Beal. Neither did Perry H. Beal as her administrator, nor as the executor of George W. Beal, list it in the inventories of either of the estates, until about the end of his administration, when he listed it as part of the property of the estate of Sarah J. Beal. In the first annual report of Bateman as guardian, subsequent to the execution of the note to him by the plaintiff, no mention is made of a note due from the plaintiff. In subsequent reports, both by him and Louella N. Newkirk, the note signed by plaintiff and George W. and Maybell U. Beal is listed among the assets of the Sarah J. Beal estate. In all the reports of Louella N. Newkirk, subsequent to the one filed by Bateman on November 30, 1892, it is listed with other notes, all of which were executed to the guardian by different members of the Beal family, ostensibly for money of the estate borrowed from the guardian. With reference to them it was reported that they were "secured" or "secured by mortgage." These latter re-

ports were verified by the oath of Louella N. Newkirk. Attached to some of them was a statement in writing signed by one or more of the other members of the Beal family, expressing approval of them. In his testimony, the plaintiff stated that the note due from him was executed for money borrowed from Bateman belonging to the estate of Sarah J. Beal in the hands of Bateman as her guardian. He explained the disparity in the dates of the note and the deed to Bordeaux, by saying that for some reason which he did not at the time of the trial recollect, the money was obtained at the time the deed to Bordeaux was executed, but that the note was not executed until later.

It will be noted that the court found as a fact that the defendants Beal became the owners of the property under the deed from Bateman and wife to Louella N. Newkirk, and that they have been claiming to be the owners ever since. This cannot be correct. That deed, executed, as it was, during the lifetime of Sarah J. Beal, vested title *prima facie* in her guardian in trust for her. She was then living, and therefore had no heirs. What the court meant to say, doubtless, was that these defendants became vested with the title upon the death of Sarah J. Beal as her successors by virtue of that deed. Be this as it may, the single finding that the transaction between plaintiff and Bateman was a sale is sufficient to sustain the judgment if it has substantial foundation in the evidence. If that was a sale, plaintiff fully divested himself of title and thereafter had no further interest in the property, no matter how or when or upon what consideration the title thereafter became vested in the defendants Beal. For if Bateman became a purchaser—as the court found—he became vested with the legal title as fully as if Bordeaux had himself been the owner instead of mortgagee. The evidence fully justified the finding of the court that he was a purchaser. The only direct evidence on the subject was that of plaintiff and Bordeaux. The plaintiff testified that he “wished to make a loan from the guardian of Mrs. Sarah J. Beal”; that, being ignorant of the law, he presumed that he had to give a mortgage to someone and have it transferred to the

guardian; that he spoke to Bordeaux about giving him (Bordeaux) an instrument to secure payment of the money; that such an instrument was delivered to Bordeaux; that in the meantime he had a conversation with George W. Beal (the purport of this conversation is not stated); and that he expected to get the money from Mrs. Beal through Bateman, the guardian. Being asked to relate the facts of the transaction between himself and Bateman as to the loan, he said: "The conversation was not extensive. It was in a few words requesting of them a loan. \* \* \* The beginning of the transaction was through Bordeaux to secure a loan from the guardian of Mrs. Beal, and in order to do that I gave Mr. Bordeaux a mortgage to secure the payment of this loan." His conversation with Bateman with reference to the matter "was short. I made known to him that I wished to secure this loan and got the money." He got \$800, agreeing to pay the estate \$1,000. The note evidencing this indebtedness was the one dated December 31, 1890—not the one described in the complaint. The difference between the \$1,000 and the \$800 actually received was last seen by him in the hands of George W. Beal. He could not tell why it was retained by Beal or what became of it. He paid \$300 on the note in 1891. To secure the loan he gave Bordeaux "a mortgage or deed intended for a mortgage to be transferred to—well, you might say now to the guardian of Mrs. Sarah J. Beal—it would be the estate." This statement had reference to the deed of June 30, 1890. He received, he said, no consideration from Bateman or the estate for the making of this instrument. His statement as to the delivery of the deed on November 12, 1890, is: "We [plaintiff and Bordeaux] were together, I think we were together when that deed was delivered to Mr. Bateman—when that mortgage was delivered to Bateman. He was with him [me] at the time, I am pretty positive; I am not quite positive though in regard to that. I think Mr. Bordeaux delivered this deed to me in Mr. Bateman's presence." He failed to state anywhere in his testimony that Bateman did not pay him the consideration recited in the deed, nor that the

transaction was other than it purported to be, viz., a sale. When in addition to the vague and fragmentary character of his story, we note that Bateman and wife (not Bateman, guardian) are named as grantees, that there is a disparity between the date of the deed and the note, that there is a disparity between the date of this note and that alleged in the complaint, that plaintiff never at any time during more than twenty-one years after the date of the deed to Bateman and wife made any claim to the property, which stands as an admitted fact, and that Bateman, the only person who knew all the facts of the transaction, is now dead, the case made upon plaintiff's own testimony is so inherently weak that, standing alone and uncontroverted, it cannot be said that it is as clear and convincing as it must have been, within the rule applicable to this class of cases. (*Gassert v. Bogk*, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281; *Murray v. Butte-Monitor T. Min. Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132; *Swain v. McMillan*, 30 Mont. 433, 76 Pac. 943; *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6.) The inherent improbability of it was such that the court might, without countervailing evidence, have rejected it as unworthy of belief. (*Mattock v. Goughnour*, 11 Mont. 265, 28 Pac. 301.) But waiving aside this consideration, the story of Bordeaux, plaintiff's own witness, is in direct conflict with plaintiff's story in every particular, except the fact that the deed to himself was intended as a mortgage. His version of the Bateman transaction was that found by the court. It is corroborated by the recitals of the Bateman deed, by the plaintiff's omission to deny Bordeaux's statement that the transaction was a sale, by his silence as to his receipt of the consideration, as well as by his omission to claim any interest in the property thereafter. It is also controverted by the testimony of Maybell U. Beal who detailed the circumstances out of which the note originated. Her uncontroverted statement was that about the time the note was executed, plaintiff had become indebted in such a way that his failure to make payment would be a source of embarrassment to the Beal family; that this was brought to her knowledge by



her father, with a request that she join him and plaintiff in the note, and thus procure the money needed by plaintiff, and that out of consideration for the family she did so. She never heard of any mortgage security. If this story is true, the debt was incurred more than a month after the deed had been executed and delivered. Upon this condition of the evidence the court was wholly justified in rejecting the evidence of plaintiff. If it be rejected, there is nothing of substantial probative value left in the record to support his claim. It is true the course pursued by both guardians with reference to the property as indicated by their reports seems to be inconsistent with the present attitude of the defendants Beal. For illustration: When Bateman resigned his guardianship he took a receipt from Mrs. Newkirk, his successor. This mentioned the note, but not the property. His conveyance to her was for a consideration of \$1. This fact is not anywhere explained. Mrs. Newkirk's memory was wholly at fault; so also was the memory of Mrs. Bateman. The recitals in the report of Mrs. Newkirk as guardian are not explained. All of these matters are of equivocal import, but, in the absence of other explanatory evidence, they furnished a basis for speculation rather than substantial proof upon which a court would not venture to overturn rights which, upon the face of the record evidence of them, are lawfully vested. They do not so connect the note of December 31, 1890, with the deed to Bateman and wife, as that one can say with any certainty that the latter was intended as security for the former. Upon this record, therefore, it cannot be said that the plaintiff has sustained the burden imposed upon him by the rule announced in the cases cited *supra*.

Counsel invoke the rule of the maxim, "Once a mortgage, [2] always a mortgage," and insist that since the conveyance to Bordeaux was admittedly a mortgage, and a mortgage does not convey title but creates merely a chattel interest (*Rader v. Ervin*, 1 Mont. 632; *Holland v. Board of Commissioners*, 15 Mont. 460, 27 L. R. A. 797, 39 Pac. 575; *Swain v. McMillan*, *supra*; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep.

598, 81 Pac. 4; Rev. Codes, secs. 5723, 6877), the Bordeaux-Bateman transaction could not vest title in Bateman and wife, and therefore the defendants Beal could not become vested with it by the conveyance from Bateman. The rule invoked by counsel can have application only to cases in which relief is sought by the mortgagor against the mortgagee himself or his grantee with notice. It is the rule everywhere that when [3] the mortgage is in the form of a deed absolute, and there is no written defeasance of record, one who becomes a grantee of the mortgagee without notice of the fact that the deed was intended as a mortgage, acquires the title free from the lien. Such is the rule declared by section 5750 of the Revised Codes. The underlying principle is that the mortgagor, by making the mortgagee the ostensible owner in fee, arms him with a power of attorney by which he can convey the title, and when he has made a conveyance to a purchaser for value without notice, the mortgagor is fully divested of his title. He is clearly estopped by the deed from questioning the purchaser's title. (16 Cyc. 773, 774; *Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592; *Minton v. New York Electric Ry. Co.*, 130 N. Y. 332, 29 N. E. 319; *Wimmer v. Ficklin*, 14 Bush (Ky.), 193; Bigelow on Estoppel, 6th ed., 607; Jones on Mortgages, 7th ed., 342d.)

Under the facts disclosed in this case, however, it is not important to inquire what notice Bateman had. If it was the purpose of plaintiff to sell the property to him, and the plaintiff received the consideration from him, it would be permitting plaintiff to perpetrate a palpable fraud, should he be awarded the right to redeem. Upon the assumption that Bateman knew of the condition of the title, the deed was made under the direction of plaintiff. Both he and Bateman treated the deed as vesting the title in Bordeaux. This deed, therefore, lost its character as a mortgage and became a deed absolute in fact. Both treated it as conveying title, and Bateman having presumptively paid the stipulated consideration on the theory that he was obtaining title, the plaintiff cannot now be heard to say

the contrary. (*Richmond v. Richmond*, 20 Fed. Cas. No. 11,801; *Haggerty v. Brower*, 105 Iowa, 395, 75 N. W. 321; *Watson v. Edwards*, 105 Cal. 70, 38 Pac. 527; 27 Cyc. 974.)

The court did not find upon the issue of the statute of limitations. Its conclusion that the evidence was insufficient to warrant relief was correct. It concluded also that though it be assumed that there was some substantial evidence tending to establish plaintiff's claim, it was barred by his laches. The latter conclusion is fully sustained by the decision in *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758. From this point of view, also, the result was correct. The judgment and order are therefore affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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POE, APPELLANT, v. SHERIDAN COUNTY ET AL., RESPONDENTS.

(No. 3,670.)

(Submitted March 23, 1916. Decided April 25, 1916.)

[157 Pac. 185.]

*County Seat Elections—Jurisdiction—Parties—Defect—Demurrer—Attorney General—County Attorney—County Commissioners—Laches.*

County Seat Elections—Jurisdiction.

1. In the absence of statutory provision authorizing a "contest" of a county seat election alleged to have been the result of fraud and corrupt practices, and *quo warranto* not being available, the district court has jurisdiction under its equity powers to hear and determine such a matter, until such time as the law shall provide the procedure.

[As to election contests in case of change of county seat, see note in *Ann. Cas.* 1912C, 691.]

Same—Plaintiff—Capacity to Sue—Demurrer.

2. Want of authority in a taxpayer to maintain a proceeding of the kind referred to above forms no ground of special demurrer, and has nothing to do with lack of "legal capacity to sue," men-

tioned in subdivision 2 of section 6534, Revised Codes, meaning that plaintiff shall be free from such general disability, as infancy or insanity, which must appear on the face of the complaint to make the pleading demurrable.

Same—Defect of Parties—Demurrer.

3. Under section 6535, Revised Codes, a demurrer for defect of parties must point out the particulars relied on, showing the absence of necessary, as distinguished from merely proper, parties.

Same—Who may Sue.

a. Any citizen, who is also an elector and taxpayer, may be the party plaintiff in a proceeding to determine the validity of a county seat election.

Same—Duties of Attorney General—Parties.

5. It is not one of the duties of the attorney general of the state to prosecute an inquiry into alleged fraudulent and corrupt practices at a county seat election; hence a demurrer to the complaint in such a proceeding for defect of parties plaintiff, because of his absence, was improperly sustained.

Same—County Attorney—Parties.

6. The county attorney of the county referred to above, himself made one of the defendants, and as the legal adviser of his co-defendant county commissioners, was not a proper party plaintiff in the proceeding, and a demurrer for defect of parties because he had not been joined with plaintiff did not lie.

Same—County Commissioners—Parties.

7. Inasmuch as the co-operation of the commissioners of a county, the seat of government of which was claimed to have been illegally located, was necessary to a complete adjudication of the matter, they were properly parties defendant, even though innocent of any wrongdoing.

Same—Laches—What Does not Constitute.

8. A suit to test the legality of a county seat election, brought fourteen weeks after the result was declared and fifteen weeks after the election had taken place, was not barred by laches.

*Appeal from District Court, Sheridan County; F. N. Utter, Judge.*

SUIT by Clinton J. Poe against Sheridan County, the Board of County Commissioners, and others. From a judgment of dismissal, plaintiff appeals. Judgment reversed and cause remanded with directions to overrule the demurrer.

*Messrs. Norris, Hurd & McKellar and Mr. C. E. Comer, for Appellant, submitted a brief; Mr. Edwin L. Norris argued the cause orally.*

Want of legal capacity to sue refers to a general legal disability, such as infancy, idiocy, lunacy or want of title in the plaintiff to the character in which he sues. Therefore when

the plaintiff is a natural person under no legal disability to maintain action, and, in this case such does not appear upon the face of the complaint, a demurrer on the ground of want of capacity to sue is not well taken. (31 Cyc. 296; *Pence v. Aughe*, 101 Ind. 317; *Hunt v. Monroe*, 32 Utah, 428, 11 L. R. A. (n. s.) 249, 91 Pac. 269; *Louisville & N. R. Co. v. Brantley's Admr.*, 96 Ky. 297, 49 Am. St. Rep. 291, 28 S. W. 477; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Bem v. Shoemaker*, 7 S. D. 510, 64 N. W. 544; *Rinehart v. Hasco Bldg. Co.*, 153 App. Div. 153, 138 N. Y. Supp. 258; *Missouri K. & T. Ry. Co. v. Lenahan*, 39 Okl. 283, 135 Pac. 383.) That a citizen and taxpayer has the legal right to maintain any action in this state necessary to enforce a public right has been a basic principle of our jurisprudence since the case of *Chumasero v. Potts*, 2 Mont. 242, was decided in 1875. And this principle is supported by the overwhelming weight of authority. (Pomeroy's Code Remedies, 3d ed., sec. 142; *Sweatt v. Faville*, 23 Iowa, 321; *Todd v. Rustad*, 43 Minn. 500, 46 N. W. 73; *Harney v. Charles*, 45 Mo. 157; *Mitchell v. Lasseter*, 114 Ga. 275, 276, 40 S. E. 287; *Doan v. Board of Commissioners*, 3 Idaho, 38, 26 Pac. 167; *Lanier v. Padgett*, 18 Fla. 842; *Gibson v. Supervisors*, 80 Cal. 359, 22 Pac. 225; *Simpson County v. Buckley*, 81 Miss. 474, 33 South. 650, 85 Miss. 713, 38 South. 104; *Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171; *Kilgore v. Jackson*, 55 Tex. Civ. App. 99, 118 S. W. 819; *Dickey v. Reed*, 78 Ill. 261; *Adams v. Smith*, 6 Dak. 94, 50 N. W. 720; *Henderson v. Marcell*, 1 Kan. 137; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165; *Krieschel v. Board of Commissioners*, 12 Wash. 428, 436, 41 Pac. 186; *Marsden v. Harlocker*, 48 Or. 90, 120 Am. St. Rep. 786, 85 Pac. 328; *State v. Langlie*, 5 N. D. 594, 32 L. R. A. 723, 67 N. W. 958.)

A demurrer on the ground of defect in the parties plaintiff reaches only the point that there are parties omitted who should have been made parties plaintiff. (Pomeroy's Code Remedies, 3d ed., sec. 206; *Palmer v. Davis*, 28 N. Y. 242; *Lowry v. Jackson*, 27 S. C. 318, 3 S. E. 473; *Boldt v. Budwig*, 19 Neb. 739,

28 N. W. 280; *Powers v. Bumcratz*, 12 Ohio St. 273; *Berkshire v. Shultz*, 25 Ind. 523; *Mornan v. Carroll*, 35 Iowa, 22; *Truesdell v. Rhodes*, 26 Wis. 215.) A demurrer on this ground must show that the parties are too few, and name those who should be brought in. (*Bakes v. Reese*, 150 Pa. St. 44, 24 Atl. 634; *Dewey v. State*, 91 Ind. 173; *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099; *Wolf v. Eppenstein*, 71 Or. 1, 140 Pac. 751; *Davis v. Chouteau*, 32 Minn. 548, 21 N. W. 748.)

In a court of general jurisdiction a demurrer for want of jurisdiction of the subject of the action will not lie unless the complaint upon its face affirmatively shows lack of jurisdiction. (Sec. 6534, Rev. Codes; *Beach v. Spokane Ranch & Water Co.*, 25 Mont. 379, 65 Pac. 111; *Doll v. Feller*, 16 Cal. 432; *Mildeberger v. Franklin*, 130 App. Div. 860, 115 N. Y. Supp. 903; *Foster v. Roseberry*, 98 Tex. 138, 81 S. W. 521; *Pollock v. Carolina etc. Loan Assn.*, 48 S. C. 65, 59 Am. St. Rep. 695, 25 S. E. 977; *Dorman v. Ames*, 9 Minn. 180; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185.)

The district courts of this state are courts of general jurisdiction, and have jurisdiction in all cases at law and in equity in which the value of the property in controversy exceeds fifty dollars. (Const., Art. VIII, sec. 11; sec. 6275, Rev. Codes.) Unless want of jurisdiction of the subject of the action affirmatively appears, the presumption must be indulged that the district court possesses jurisdiction (*Beach v. Spokane Ranch & Water Co.*, 25 Mont. 379, 65 Pac. 111). Although the law providing for a county seat election fails to provide a method for contesting the election, a court of equity has jurisdiction to entertain a proceeding impeaching the election for illegality and fraud, and will award whatever relief the exigencies of the case require. (11 Cyc. 379; McCrary on Elections, 4th ed., sec. 389; *Patterson v. People*, 23 Colo. App. 479, 130 Pac. 618; *Calaveras County v. Brockway*, 30 Cal. 325; *Dickey v. Reed*, 78 Ill. 261; *Simpson County v. Buckley*, 85 Miss. 713, 38 South. 104; *Maxey v. Mack*, 30 Ark. 472, 473; *Ulrich v. Clement* (Sup. Ct. S. T.), 124 N. Y. Supp. 133; *Shaw v. Cir-*

*cuit Court*, 27 S. D. 49, 129 N. W. 907; *Lanier v. Padgett*, 18 Fla. 842; *Sweatt v. Faville*, 23 Iowa, 321; *State v. Commissioners of Hamilton County*, 35 Kan. 640, 11 Pac. 902; *Marsden v. Harlocker*, 48 Or. 90, 120 Am. St. Rep. 786, 85 Pac. 328; *Doan v. Board of Commissioners*, 3 Idaho, 38, 26 Pac. 167; *Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171; *Kilgore v. Jackson*, 55 Tex. Civ. App. 99, 118 S. W. 819; *Krieschel v. Board of Commissioners*, 12 Wash. 428, 41 Pac. 186; *Mitchell v. Lasseter*, 114 Ga. 275, 40 S. E. 287; *Todd v. Rustad*, 43 Minn. 500, 46 N. W. 73.)

All that is required to make the complaint sufficient in cases of this character is that the plaintiff shall definitely apprise the defendants of the charges relied upon, so that they may be prepared to meet them with appropriate proof. (*Stephens v. Nacey*, 47 Mont. 479, 133 Pac. 361; *Sweatt v. Faville*, 23 Iowa, 321, 322; *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69; *Boren v. Smith*, 47 Ill. 482; *Doan v. Board of Commissioners*, 3 Idaho, 38, 26 Pac. 167; *Gibson v. Supervisors*, 80 Cal. 359, 22 Pac. 225; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165.)

*Mr. Howard M. Lewis, Mr. Paul Babcock and Mr. Geo. A. Bangs*, for Respondents, submitted a brief; *Mr. Bangs* argued the cause orally.

The function performed in the selection or designation of the seat of government, be it either of a city, township, county, state or national, is purely legislative in its nature; it does not participate, in the slightest, either of the judicial or executive. Agents appointed by the legislature to select a county seat are clothed with the sovereign power and discretion of the state, which discretion, so far as it depends upon the exercise of their judgment, no court has a right to control unless they violate private rights. (11 Cyc. 368; *Jewell v. Weed*, 18 Minn. 272; *Walker v. Tarrant County*, 20 Tex. 16; *Leach v. Nez Perce*, 24 Idaho, 322, 133 Pac. 926; *Bagot v. Antrim Supervisors*, 43 Mich. 577, 5 N. W. 1018.)

Fundamentally, the questions arising out of the election are political in their nature, and this is particularly true with respect to the determining and declaring of the result. This is a matter confided exclusively to the legislature, and there can be no judicial question arise therefrom save as the legislature may have created it. We refer particularly, of course, to the questions presented in the case at bar. If election officers refuse to perform their duties, the courts can compel them so to do. (15 Cyc. 394; *State v. Village of McIntosh*, 95 Minn. 243, 103 N. W. 1017; *Brueggemann v. Young*, 208 Ill. 181, 70 N. E. 292; *Simon v. Portland Common Council*, 9 Or. 437; *McWhorter v. Dorr*, 57 W. Va. 608, 110 Am. St. Rep. 815, 50 S. E. 838; *Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 26; *Reynolds & Henry Const. v. Police Jury*, 44 La. Ann. 863, 11 South. 236; *Hipp v. Board of Supervisors*, 62 Mich. 456, 29 N. W. 77; *Moulton v. Reid*, 54 Ala. 320; *Caldwell v. Barrett*, 73 Ga. 604; *Clarke v. Rogers*, 81 Ky. 43; *Williamson v. Lane*, 52 Tex. 335; *Link v. Karb*, 89 Ohio St. 326, 104 N. E. 632; *Mann v. Wright*, 81 Wash. 358, 142 Pac. 697.)

Election contests are not within the jurisdiction of courts of equity. (*Hester v. Bourland*, 80 Ark. 145, 95 S. W. 992; *Markert v. Sumter County*, 60 Fla. 328, Ann. Cas. 1912C, 690, 53 South. 613; *Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 26; *Devous v. Gallatin County*, 244 Ill. 40, 18 Ann. Cas. 422, 91 N. E. 102; *Baker v. Mitchell*, 105 Tenn. 610, 59 S. W. 137.) The overwhelming weight of authority is that a court of equity has no jurisdiction to entertain, hear, try and determine the contest of an election for county seat. (*Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757; *Hipp v. Board of Supervisors*, 62 Mich. 456, 29 N. W. 77; *McWhirter v. Brainard*, 5 Or. 426; *Harrell v. Lynch*, 65 Tex. 146; *Nixon v. Police Jury*, 132 La. 53, 60 South. 717; *Native Lumber Co. v. Board of Supervisors*, 89 Miss. 171, 42 South. 665; *Wilson v. Town of Whitley*, 159 Ky. 69, 166 S. W. 775; *Markert v. Sumter County*, 60 Fla. 328, Ann. Cas. 1912C, 690, 53 South. 613; *Devous v. Gallatin County*,



244 Ill. 40, 18 Ann. Cas. 422, 91 N. E. 102; *Hamilton v. Carroll*, 82 Md. 326, 33 Atl. 648.)

No person has a property right in the location of the county seat (7 Am. & Eng. Ency. of Law, 1043; *Swartz v. Board of Commrs.*, 158 Ind. 141, 63 N. E. 31; *Walker v. Tarrant County*, 20 Tex. 16, 21), and therefore a private citizen has no standing in court to maintain a suit to prevent removal by the proper authorities. (*Armstrong v. Board of Commrs.*, 4 Blackf. (Ind.) 208; *Luce v. Fensler*, 85 Iowa, 596, 52 N. W. 517; *Walker v. Tarrant County*, 20 Tex. 16; *Harrell v. Lynch*, 65 Tex. 146; *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757.)

The relief prayed for in this case is mandatory in its nature as well as prohibitory; the plaintiff prays that this court command the defendants to maintain their offices at Medicine Lake and to restrain them from maintaining such offices at Plentywood. The case is analogous to *mandamus*; if the plaintiff cannot maintain *mandamus* to compel the defendant to maintain their offices at the county seat, he is not entitled to the relief here prayed for. The better opinion and the weight of authority is that, where the duty to be performed is public in its nature, the writ of *mandamus* can be applied for only by the duly constituted authorities, and that a private citizen (as such) will not be heard, unless he has some special interest in the performance or fulfillment of the duty such as does not pertain to other citizens. (*Thomas v. Hamilton*, 101 Mich. 387, 59 N. W. 658; *Dean v. Dimmick*, 18 N. D. 397, 122 N. W. 245; *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325; *Chapman v. People*, 9 Colo. App. 268, 48 Pac. 153; *Fritts v. Charles*, 145 Cal. 512, 78 Pac. 1057; *Doolittle v. Supervisors*, 18 N. Y. 155; *State v. Holinshead*, 47 N. J. L. 439, 2 Atl. 244; *Heffner v. Commonwealth*, 28 Pa. St. 108; *Moon v. Cort*, 43 Iowa, 503; *Adkins v. Doolen*, 23 Kan. 659; *Lyon v. Rice*, 41 Conn. 245; *Atwood v. Partree*, 56 Conn. 80, 14 Atl. 85.)

Even if the plaintiff at one time possessed a cause of action, it has been barred by laches. He has at all times been aware of his interest, if any he has, which he now claims in the location

of the county seat, and it is impossible that, being a resident of the county, he was not aware of the proceedings being carried on which would in their result, affect such interest. He was, therefore, under obligations to look into such proceedings and protect that interest, and at the same time take such steps as would prevent others from changing their position and altering their relations, to their detriment, relying upon the result of such proceedings. (*Rice v. County Board*, 50 Kan. 149, 32 Pac. 134; *Eggleston v. Kent Cir. Judge*, 50 Mich. 147, 15 N. W. 55; *People v. Chapin*, 104 N. Y. 96, 10 N. E. 141; *State v. Cappeller*, 39 Ohio St. 455; *State v. Juneau County Supervisors*, 38 Wis. 554; *McConoughey v. Torrence*, 124 Cal. 330, 57 Pac. 81; *State v. Knight*, 31 S. C. 81, 9 S. E. 692; *State v. Superior Court*, 15 Wash. 314, 46 Pac. 232; *Moore v. Waco Bldg. Assn.*, 92 Tex. 265, 47 S. W. 716; *State v. Gibson*, 187 Mo. 536, 86 S. W. 177, 181.)

MR. JUSTICE SANNER delivered the opinion of the court.

At the election held November 3, 1914, the towns of Plentywood and Medicine Lake were presented to the electors of Sheridan county as candidates for permanent county seat, and upon the returns as canvassed by the board of commissioners, it was, on November 9, 1914, declared that Plentywood had prevailed by a majority of 46 votes. Thereafter, and on February 13, 1915, the appellant, an elector and taxpayer of said county and a resident of Medicine Lake, filed his complaint, naming as defendants the county of Sheridan, its board of commissioners, the individuals composing said board, and the persons holding the various offices in said county. The gravamen of the complaint is that Medicine Lake did, and Plentywood did not, in fact receive the highest number of legal votes cast at said election for county seat; the appearance of that result on the face of the returns being due to certain violations of the Corrupt Practices Act committed by persons acting for and in the interest of Plentywood, in consequence of which votes to the number of 300 were unlawfully influenced to be cast and

were cast for Plentywood, to the reception and counting for Plentywood of ballots to the number of 53 from persons who were not legally entitled to vote at said election, and to the miscounting of 100 or more ballots by the judges of election in certain precincts, to the prejudice of Medicine Lake. It is not averred that any of the defendants named, except Onstad, had anything to do with any of these conditions; but it is charged that notwithstanding the true result of the election, the defendants insist on maintaining and do maintain, their respective offices at Plentywood, which prior to the election was the temporary county seat of Sheridan county, and decline to move to Medicine Lake. The prayer asks that each and all of the defendants who have custody of the original returns, ballots and election records produce the same upon the trial, to the end that the same may, as to the precincts affected, be opened and counted; that a decree be entered declaring Medicine Lake to be the county seat of Sheridan county, requiring the county commissioners to cause the records of said county to be removed thither, commanding all the individual defendants to maintain their offices at that place, and enjoining them from maintaining said offices at Plentywood; that plaintiff recover of the defendants his costs and disbursements herein incurred, with such other relief as may be equitable and just.

To this complaint the defendants jointly demurred upon the grounds: (a) That "plaintiff has not the legal capacity or legal authority to maintain this action or to sue in the above-entitled matter"; (b) that there is a defect of parties plaintiff; (c) want of jurisdiction in the court over the subject matter of the action; and (d) that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was sustained, resulting in a judgment of dismissal, from which this appeal is taken.

1. Though third in the order of assignment, the question of jurisdiction must be disposed of *in limine*. The contention is [1] that the selection of county seat is a purely political function, that the legislature has not intentionally or accidentally

conferred upon the courts authority to investigate and determine the result of an election for such purpose, and that the courts have no inherent power so to do; the result must therefore be left exactly as the board of canvassers have declared it, notwithstanding that such declaration may be far from the true result of the election. This contention is supported by adroit argument, by an admirable brief and by respectable authority; nevertheless it is without merit, in our opinion. Conceding that the selection or removal of a county seat is a purely political function, the Constitution of this state (Art. V, sec. 26; Art. XVI, sec. 2), as well as the legislation upon the subject (Chap. 135, Laws 1911; Rev. Codes, secs. 2851-2856), confides that function, not to judges of election or the canvassers of the returns, but to a certain proportion of the qualified electors of the county affected. That the actual choice of the qualified electors exercised under circumstances sanctioned by law, cannot be questioned by any authority, is undoubted; a necessary corollary, however, is that such choice is not to be aborted or annulled by careless or designing election boards whose functions in respect to the result of the election are ministerial only. (*Pigott v. Board of Canvassers*, 12 Mont. 537, 31 Pac. 536; *State v. Board of Canvassers*, 13 Mont. 23, 31 Pac. 879; *State ex rel. Breen v. Toole*, 32 Mont. 4, 79 Pac. 403.)

For the purposes of this appeal, the allegations of the complaint are to be taken as true, and since there is no provision, constitutional or statutory, in virtue of which the executive or legislative department can effectually act in such a case, we are presented with this alternative: Either a flagrant disregard of the constitutional intendment is to go unchallenged and a most evil example to be rewarded with the fruits of its evil, or else it must rest with the courts to ascertain and decide whether the choice actually made by the requisite proportion of the qualified electors has been duly declared, or, if not, to declare it and make it effective. The latter conclusion is more in harmony with the genius of our institutions and with the

weight of authority as well. (*County of Calaveras v. Brockway*, 30 Cal. 325, 326; *Cerini v. De Long*, 7 Cal. App. 398, 94 Pac. 582; *Gibson v. Supervisors*, 80 Cal. 359, 22 Pac. 225; *Boren v. Smith*, 47 Ill. 482; *People v. Wiant*, 48 Ill. 263; *Dickey v. Reed*, 78 Ill. 261, 272; *Patterson v. People*, 23 Colo. App. 479, 130 Pac. 618; *People ex rel. Dean v. Board of Commissioners*, 6 Colo. 202; *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165; *Simpson County v. Buckley*, 85 Miss. 713, 38 South. 104; *Sweatt v. Faville*, 23 Iowa, 321; *Krieschel v. Board of Commissioners*, 12 Wash. 428, 41 Pac. 186; *Braden v. Stumph*, 16 Lea (Tenn.), 581; *Maxey v. Mack*, 30 Ark. 472, 485; *Ulrich v. Clement* (Sup.), 124 N. Y. Supp. 133; *Shaw v. Circuit Court*, 27 S. D. 49, 129 N. W. 907; *Marsden v. Harlocker*, 48 Or. 90, 120 Am. St. Rep. 786, 85 Pac. 328; *Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171.)

Why an appropriate jurisdiction for this purpose may be found in equity is instructively told in some of the decisions just cited, particularly those from Illinois and California. In answer to a claim that equity could interfere to determine which of two persons had been elected to a public office, the supreme court of Illinois defined its position thus: "It is true that in a number of county seat cases, we have held that chancery might take jurisdiction and hear and determine them. But the power was placed expressly upon the ground that the Constitution had provided that county seats should not be removed except on a vote resulting in a majority in favor of removal; and the General Assembly, in providing for the mode of holding such an election, wholly failed to provide for any means of contesting it. And to prevent the obstruction and a defeat of the rights of the majority, conferred and intended to be secured to them, it was held that the fundamental law, by implication, conferred the power on the courts of chancery. But, in making these decisions, it was on that express ground, and those cases thereby became an exception to all other cases." Indispensable to the jurisdiction of equity in any case is the absence—actual or

theoretical—of an adequate remedy at law; when that is given, equity jurisdiction is excluded. But no authority exists in this state for the proceeding technically called a “contest” to investigate a county seat election, because a county seat is not an office; this much is settled, pending action by the legislature, in *Cadle v. Town of Baker*, 51 Mont. 176, 149 Pac. 960. Neither, for the same reason, will *quo warranto* lie, and there is no remedy at law for such a condition as the one before us. Because this is the situation, and for only so long as it remains, we hold that the courts of record in this state, endowed as they are by the Constitution with general jurisdiction in equity, and charged as such to afford relief when no adequate remedy is provided by law, must take cognizance of matters of this kind; and, when called upon to do so, they may adopt “any suitable process or mode of proceeding” which may seem “most conformable to the spirit of the Code.” (Const., Art. VIII, secs. 3, 11; Rev. Codes, sec. 6329.) In the *Cadle Case* we said: “While a court of equity would intervene to prevent a city or town unlawfully obtaining the county seat, in any instance where it did not receive the highest number of legal votes, this proceeding cannot be upheld as one instituted in equity for such purpose, for the reason that it is not alleged that the corrupt practices charged operated to influence a sufficient number of votes to change the result of the election.” the complaint before us is not thus defective; sounding in equity, it alleges fraud and corrupt practices admittedly sufficient, if true; it therefore does not disclose upon its face a want of jurisdiction of the subject matter of the suit.

2. The demurrer is likewise without merit so far as the first [2] ground is concerned. Want of authority to maintain a particular suit may be, and often is, pertinent in determining whether a cause of action is stated by the complaint; but it forms no ground of special demurrer under our Code, and has nothing to do with “legal capacity to sue,” as that phrase is used in subdivision 2 of section 6534, Revised Codes. (*Brown v. Critchell*, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486; *Knight v. Le Beau*, 19

Mont. 223, 226, 47 Pac. 952.) What is there meant is that the plaintiff shall be free from general disability, such as infancy or insanity, or, if he sues as a representative, that he shall possess the character in which he sues. (*People v. Oakland W. F. Co.*, 118 Cal. 234, 50 Pac. 305; *Buckingham v. Buckingham*, 36 Ohio St. 68, 78; *Littleton v. Burgess*, 16 Wyo. 58, 16 L. R. A. (n. s.) 49, 91 Pac. 832; *Pomeroy's Code Remedies*, sec. 208.) The fact of such disability must appear on the face of the complaint, and a demurrer on this ground must point out the particular defect relied on. (Sec. 6535, Rev. Codes.) On the face of this complaint the plaintiff sues as an individual, and no lack of capacity in him as such is suggested; while the specification in the demurrer shows that it is merely aimed at his right in his proper person to maintain this particular suit.

3. A demurrer for defect of parties must also point out the [3-6] particulars relied on (sec. 6535, Rev. Codes), showing the absence of necessary, as distinguished from merely proper, parties. (*Beach v. Spokane R. & W. Co.*, 25 Mont. 379, 384, 65 Pac. 111.) The only parties whose absence is suggested as fatal are the attorney general and the county attorney of Sheridan county; and this because the subject matter of the suit, if cognizable by the courts at all, is one of general public interest in which the plaintiff is not particularly or peculiarly concerned. If the matter is cognizable judicially, as we have said it is, then, in our judgment, it is cognizable at the instance of this plaintiff. As early as *Chumasero v. Potts*, 2 Mont. 242, it was announced as the rule in this jurisdiction: "That where a party seeks a mere private right or private relief, he must show a specific title or right to the relief demanded, but where the relief is a public matter, or a matter of public right, the people at large are the real party, and any one of the citizens can bring the action." This rule was repeated and applied in *State v. Board of County Commrs.*, 21 Mont. 469, 54 Pac. 939, and in *State ex rel Clarke v. Moran*, 24 Mont. 433, 63 Pac. 390. As announced and repeated, it has since been acted upon without question as a proposition no longer open to discussion. (*State ex rel. Geiger v.*

*Long*, 43 Mont. 401, 117 Pac. 104; *State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297; *Cadle v. Town of Baker*, *supra*.) Some of these cases, it is true, were cast in the form of special proceedings because of the nature of the relief demanded, so that the state appeared as the nominal plaintiff; but any principle which authorizes the state to sue on the relation of a private citizen, interested only as such, must likewise permit the citizen himself to sue if the cause of action can or should properly be cast in a form other than a special proceeding. The duties of the attorney general, as enumerated in our Constitution and Code, do not require him to prosecute such inquiries as the one before us, conceding that he might properly do so, while the record itself suggests that the county attorney of Sheridan county, one of the defendants at bar and the legal adviser of the defendant commissioners, is not even a proper party plaintiff in this suit.

4. Aside from the considerations above discussed, it is urged [7] that the complaint fails to state a cause of action because the defendants, in maintaining their offices at Plentywood, are complying with the law; cannot, in so doing, be violating any obligation to the plaintiff, and ought not to be harassed by this litigation; because in no event can they be put in fault until demand has been made, which the complaint does not allege; and because the complaint upon its face discloses laches. These propositions, formidable in the abstract, are not so serious as the record presents them. The demurrer is joint, raising the question whether a cause of action is stated on any theory against any of the defendants; and to this question the answer is at hand. The purpose of this suit is not to litigate, settle or administer a positive primary right peculiar to the plaintiff and infringed by the defendants; it is to have tried and determined a public question, *viz.*, where the citizens of Sheridan county have the legal right to transact public business, and to procure at the same time the relief which will make such determination effective. Not doubting, therefore, that the canvassers properly declared the result according to the returns and that



the individual defendants have properly acted upon that result as *prima facie* correct, it will nevertheless become the duty of the defendant commissioners, if Medicine Lake was in fact chosen, to obtain suitable quarters for the county administration at that place and move the county offices thither. In other words, the position of the commissioners, like that of the plaintiff, depends upon what was the true result of the election as ascertained in the suit; so that, given jurisdiction in the court below to entertain the suit, the retention of the commissioners as parties defendant must be proper because, if Medicine Lake was in fact chosen, their co-operation is necessary to the complete disposition of the matter. We do not understand that in cases of this kind one must be guilty of culpable misconduct in order to be made a party defendant; if he is the agency through which the right result must be worked out, that suffices. Officers, conscientiously seeking to discharge their duties, not infrequently find themselves perplexed and compelled to choose; they seek and act upon the advice of competent or legally designated counsel; but if, notwithstanding all this, their course is a mistake, such mistake is not to go uncorrected merely because there was no fault. If, in the present instance, Medicine Lake had received the greater number of votes according to the returns and had been declared elected, no fault could be found with the county commissioners for proceeding to remove the county records and offices to that place; but it is well established by the cases cited above that upon allegations like these here made, injunction as against the commissioners would lie to prevent such removal. (See, also, High on Injunctions, sec. 1257.) For the same reason, if the true result should require it, they can be enjoined from retaining the place of administration at Plentywood, and are proper parties in an attempt to secure such relief.

As to laches: It is the want of due diligence in the assertion [8] of a right; such diligence being measured by the requirements of particular statutes of limitations, or, short of these, by the exigencies of the case. The purpose of this suit being

to challenge the result of the election as declared, its effect, if successful, will be substantially the same as a contest; nevertheless we must repeat that this suit is not a contest. Laches, therefore, cannot be imputed to the plaintiff merely because the time prescribed for contests expired before it was commenced, and no other express limitation is suggested as controlling. This suit was brought within fifteen weeks after the election, and within fourteen weeks after the result was declared by the board of canvassers. A complaint like the one at bar ought not to be filed without the fullest investigation into the facts alleged, and such investigation, together with the resolution of the legal problems involved in formulating the case, might well justify the expenditure of as much time as was here taken, or more. Certainly, the mere lapse of so short a time cannot, without statutory command, be declared *prima facie* evidence of that want of diligence which constitutes laches.

We think the complaint states a cause of action as against the defendant commissioners at least, and, as the demurrer was joint, it should have been overruled. The judgment appealed from is therefore reversed and the cause remanded, with direction to overrule the demurrer.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

**EUSTANCE, RESPONDENT, v. FRANCIS ET AL., APPELLANTS.**

(No. 3,643.)

(Submitted March 28, 1916. Decided April 27, 1916.)

[157 Pac. 573.]

***District Courts—Substituted Judges—Powers at Chambers—Judgment on Pleadings—Appeal and Error—Persons Aggrieved—Who may Appeal.*****District Courts—Substituted Judges—Powers at Chambers—Judgment on Pleadings.**

1. A district judge was invited to another district to hear and determine an action to quiet title in which the resident judge had been disqualified. Though accepting the invitation, he never went into the county to which he had been called to assume jurisdiction, but at chambers in his own county sustained a motion for judgment on the pleadings. *Held*, that the judgment so rendered was made without jurisdiction, since his powers at chambers, whether acting on matters affecting his own or another district, are limited to the disposition of proceedings enumerated in section 6314, Revised Codes, of which a disposition of a cause on the merits is not one.

**Same—Powers of Court—Powers of Judges.**

2. A motion for judgment on the pleadings, a demurrer, a motion to strike, or the like, invokes the power of the court, not of the judge, and must be tried and determined by the court, and not by the judge.

**Same—Authority of Substitute Judges—"Hold Court."**

3. To "hold court," within the meaning of the Constitution, Article VIII, section 12, authorizing one district judge to hold court for another, is to hold court in the district just as does the local judge, and not to sit in chambers in another district.

**Appeal and Error—Who may Appeal—Persons "Aggrieved."**

4. Where judgment is rendered against parties for costs for which they are liable on execution, they are "aggrieved" within the meaning of the statute, and may appeal.

[As to who are interested parties in case of appeal, see note in 119 Am. St. Rep. 741.]

*Appeal from District Court, Cascade County, in the Eighth Judicial District; Roy E. Ayers, Judge of the Tenth District, presiding.*

ACTION by Ellen S. Eustance against Judith Francis and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Cause submitted on briefs of counsel.

*Mr. Fred A. Ewald*, for Appellants.

*Mr. C. H. Benton*, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to quiet title to certain land described in the complaint and situate in Cascade county. The action was brought in that county. The appeal is by the defendants from a judgment rendered on the pleadings under these circumstances:

In their amended answer, besides denying plaintiff's title, *etc.*, and setting forth the nature of their adverse claim, defendants also alleged in abatement of the action that another action involving the same cause of action as that involved herein, and to which the parties hereto were the same, had theretofore been decided by the court and was pending in the supreme court on appeal. Counsel for plaintiff failed to tender issue by reply, but had the cause set down for hearing, assuming that the allegations in the answer were not sufficient to present a triable issue. The hearing was had on January 5, 1914; counsel for defendants not appearing. Why he did not is not here important. On January 13, Judge Ewing, before whom the hearing was had, made an order postponing the final hearing and disposition of the cause "until after said appeal is finally determined by the said supreme court." The cause referred to in the answer and by the judge as pending on appeal is *In re Estate of Peterson*, reported in 49 Mont. 96, Ann. Cas. 1916A, 716, 140 Pac. 237, and decided on April 1, 1914. In the meantime, and on April 27, 1914, Judges Leslie and Ewing, who regularly preside in the eighth judicial district, which includes Cascade county, deeming themselves disqualified to try the action, made an order so declaring, and inviting Judge Ayers, of the tenth district, to try it. Judge Ayers accepted the invitation, but, so far as the record discloses, did not at any time go into Cascade county to assume jurisdiction to make disposition of the action. On November 2, 1914, upon five days' notice to counsel for de-

fendants, counsel for plaintiff submitted to Judge Ayers, at his chambers at Lewistown, in Fergus county (in the tenth district), a motion for judgment on the pleadings. Counsel for defendants did not appear. The motion was sustained, and the result is the judgment now before us. It was thereafter by his direction entered of record in Cascade county.

Counsel discuss in their briefs the correctness of the action of Judge Ayers on the merits of the motion. We incline to the opinion that the answer by its denials presented an issue of fact, and that Judge Ayers for this reason erred in sustaining the motion. Furthermore, though the case of *In re Peterson* had theretofore been disposed of, the record in this case fails to disclose that fact. But we shall not stop to consider the questions presented in this behalf, because, in our opinion, Judge Ayers was wholly without power to try and dispose of the motion at chambers in Fergus county.

Section 6314 of the Revised Codes defines the powers of a judge at chambers. It declares: "The judge of the district court may at chambers issue, hear and determine writs of *mandamus*, *quo warranto*, *certiorari*, prohibition, injunction and other original and remedial writs, and also all writs of *habeas corpus* on petition by, or on behalf of, any person held in actual custody in his district, and grant all orders and writs which are usually granted in the first instance upon an *ex parte* application, and, at chambers, hear and dispose of such orders and writs; and may also, at chambers, make any order, issue any process, and hear and determine any matter necessary in the exercise of his powers in matters of probate, or in any action or proceeding provided by law. If a jury is necessary the judge may open court and obtain a jury as in other cases." This provision was considered in *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753. The question what is the extent [1] of the powers of a judge of one district when called into another for temporary service in probate proceedings was discussed, and it was held, in effect, that in all such matters, exclusive jurisdiction over which is given the temporary judge

by statute because of disqualification of the local judge, the powers of the former at chambers in these matters are defined by this provision, as coextensive with the powers he possesses while presiding in his own district. The question as to their extent in ordinary actions *inter partes* was reserved. It was suggested that after returning to his own district the temporary judge may make any order in a cause tried by him, but not finally determined, such as an order for extension of time, *etc.*, necessary to make final disposition of it. But, whatever may be the extent of his powers in this behalf, they do not extend to the trial and disposition of such causes on the merits while in his own district: First, because the provisions of the Constitution authorizing one judge to hold court for another (Const., Art. VIII, sec. 12) and the statute enacted pursuant to it (Rev. Codes, sec. 6270) contemplate that the invited judge shall go into the district to which he is invited for that purpose; second, because section 6314 does not expressly or impliedly authorize it; and, third, because such a course would render nugatory the provisions of the Code relating to the place of trial of civil actions and changes of venue, and thus subject parties to the same inconveniences which they would suffer in the absence of these provisions. Even when a judge is in his own district, his powers at chambers in causes pending there are limited to the disposition of proceedings enumerated in section 6314, and may not be extended to others not enumerated. The expression "in any action or proceeding provided by law" must be understood to include only such proceedings as the judge is authorized by law to conduct at chambers, and not to include any other. Otherwise the holding of court by one judge for another, as permitted by the Constitution, would require him to go into the district only for trials upon formal issues of fact, thus leaving him free to determine at chambers in his own district all issues of law arising in the particular cause or causes allotted to him.

[2] A motion for judgment on the pleadings, a demurrer, or a motion to strike, or the like, invokes the power of the court, not of the judge, and must be tried and determined by the

[3] court, and not by the judge. To "hold court," within the meaning of the Constitution, is to hold court in the district just as does the local judge, and not to sit in chambers in another district. Section 7140, Revised Codes, only provides for the presentation of such motions as the judge may entertain at chambers, and does not authorize a judge of an adjoining district to hear a motion which he could not hear at chambers if he were personally present in the district in which the parties reside. It is sometimes the case that, when the local judge is for any reason disqualified in a particular cause, and another judge has been designated to try and determine it, the parties by stipulation submit to him for decision at chambers in his own district the issues of law arising therein. Sometimes also, upon submission of a cause for decision at the close of the trial regularly had, it is stipulated that the judge may make up his findings and decision after returning to his own district and transmit them to the clerk for filing and entry of judgment. Doubtless in such a case the parties would be held to be estopped by their stipulation to question the validity of the result. Nothing said herein is to be understood as holding to the contrary.

Counsel for plaintiff insists that the defendants cannot maintain this appeal, because it appears from the record that they have not been aggrieved by the judgment. The court rendered judgment against them for costs. They are thus liable under execution for the same, and hence are aggrieved within the meaning of the statute.

The judgment is reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

## LEWIS, ADMR., RESPONDENT, v. STEELE, APPELLANT.

(No. 3,638.)

(Submitted March 27, 1916. Decided April 28, 1916.)

[157 Pac. 575.]

*Automobiles—Cities and Towns—Street Accident—Parent and Child—Negligence—Liability—Respondeat Superior—Evidence.**Personal Injuries—Contributory Negligence—Pleading.*

1. A plea of contributory negligence may be coupled with a denial of primary negligence; hence it was error to sustain a demurrer to an answer so pleading, in an action for damages for the death of plaintiff's intestate alleged to have been caused by the negligent driving of an automobile.

*Same—Demurrer—What not Harmless Error.*

2. Error in sustaining a demurrer to the plea of contributory negligence, because coupled with a denial of negligence on defendant's part, thus rendering inadmissible any evidence on contributory negligence as a defense, *held* prejudicial, notwithstanding evidence suggesting contributory negligence was admitted during the trial and instructions on the subject were given.

*Same—Automobiles—Negligence—Parent and Child—Liability of Parent.*

3. Since a father is not responsible for the negligent or willful torts of his child, and an automobile is not inherently dangerous, the father may not be held responsible for the killing of a pedestrian by the negligence of his minor son in driving his father's machine, if it was taken without his knowledge or consent, or, if with his consent, it was taken for a purpose foreign to that for which it was kept and customarily used.

*Same—Liability of Parent—Respondeat Superior.*

4. *Held*, that defendant, as owner of an automobile used for the pleasure of himself and his family, including two minor sons upon whom he relied as drivers and from whom he exacted such service, was liable, under the doctrine of *respondeat superior*, for injuries to a pedestrian resulting in death, occasioned through the negligent running of the machine by one of his sons who was using it at the time, with defendant's consent, to convey a party of friends to a dance.

*Same—Automobiles—Negligence—Rule of Liability.*

5. In the absence of legislation to the contrary, the same general rules of responsibility, direct and consequential, are applicable to the use of an automobile as apply to other common methods of transportation.

[As to negligence in case of automobile accidents on highways, see note in 108 Am. St. Rep. 213.]

*Same—Damages—Earning Capacity—Evidence—Technical Error.*

6. The admission of evidence as to the usual charges made by

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The question of liability of owner of automobile where parent's automobile is being driven by child is discussed in notes in 41 L. R. A. (n. s.) 775; 50 L. R. A. (n. s.) 59; 10 L. R. A. (n. s.) 933.



Christian Science practitioners, in the absence of a showing that deceased was accustomed to make such charges, was technical error.

Same—Automobiles—Excessive Speed—Evidence—Admissibility.

7. Testimony of one of the occupants of the automobile at the time of the accident, that the appearance of deceased was so sudden that it could not have been stopped in time to avoid striking her, even if its speed had not exceeded four miles an hour, was admissible as tending to show that the accident was not due to excessive speed.

Same—Street Accident—Evidence—Admissibility.

8. It was proper for defendant to show that, when first seen by the occupants of the automobile, the decedent's actions were such as to create the impression that she was waiting for a car, and was not about to cross a street intersection.

Same—Evidence—Avoiding Effect of Other Evidence—Admissibility.

9. It having been shown that after the accident the machine proceeded to the dance to which defendant's sons and their guests were going, and that defendant's son who drove the car there danced several times, evidence that his other son had inquired at decedent's house and was informed that her injury was not serious was admissible to avoid the prejudice which might arise from the imputation of heartlessness or undue haste.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Abraham G. Lewis, as administrator of the estate of Rose Amelia Lewis, deceased, against Charles Steele. Judgment for plaintiff. Defendant appeals. Judgment and order denying a new trial reversed and cause remanded for new trial.

*Mr. E. B. Howell and Mr. William Meyer, for Appellant, submitted a brief and argued the cause orally.*

The appellant contends that he is not liable for any tort committed by his minor son during the appellant's absence unconnected with his business, and without his authority or approval. (See *Herndobler v. Rippen*, 75 Or. 22, 146 Pac. 140; *Tift v. Tift*, 4 Denio (N. Y.), 175; *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325; *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336; *Smith v. Davenport*, 45 Kan. 423, 23 Am. St. Rep. 737, 11 L. R. A. 429, 25 Pac. 851; *Paul v. Hummel*, 43 Mo. 119, 97 Am. Dec. 381; *Schlossberg v. Lahr*, 60 How. Pr. (N. Y.) 450; *Evers v. Krouse*, 70 N. J. L. 653, 66 L. R. A. 592, 58 Atl. 181; *Paulin v. Howser*, 63 Ill. 312; *Chandler v. Deaton*, 37 Tex. 406; *Klapproth v. Smith* (Tex. Civ.), 144 S. W. 688; *Bard v. Yohn*, 26 Pa. St. 482.)

"The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sail boat, or a motor launch." (*Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Jones v. Hoge*, 47 Wash. 663, 125 Am. St. Rep. 915, 14 L. R. A. (n. s.) 216, 92 Pac. 433; 28 Cyc. 25; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Vincent v. Crandall & Godley Co.*, 131 App. Div. 200, 115 N. Y. Supp. 600; *Berry on Automobiles*, sec. 20; *Harris v. Cameron*, 81 Wis. 239, 29 Am. St. Rep. 891, 51 N. W. 437.)

Since the automobile is an innocent instrument in itself, to be classed in the same category with the family horse, the family bicycle or motor boat, and since Ralph Steele was thoroughly skilled in its use, the question of defendant's liability is narrowed down to the single issue of whether Ralph was acting as the servant of his father at the time of the accident. Only upon the affirmative of this question can this action be maintained. The doctrine that the use of the thing bought for pleasure is the business of the owner and, when an accident occurs in its use, the doctrine of *respondet superior* can be invoked, is absurd, even though the courts of Oklahoma (*McNeal v. McKain*, 33 Okl. 449, 41 L. R. A. (n. s.) 775, 126 Pac. 742) and Washington (*Birch v. Abercrombie*, 74 Wash. 486, 50 L. R. A. (n. s.) 59, 133 Pac. 1020) have seen fit to follow it. The doctrine is unsound, in that it looks to the motive or intent with which the owner has purchased the automobile rather than to the use made of it, for the purpose of defining the scope of his liability. (*Bard v. Yohn*, 26 Pa. St. 482; *Parker v. Wilson*, 179 Ala. 361, 43 L. R. A. (n. s.) 87, 60 South. 150; *Roberts v. Schanz*, 83 Misc. Rep. 139, 144 N. Y. Supp. 824; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Doran v. Thomsen*, 76 N. J. Law, 754, 131 Am. St. Rep. 677, 19 L. R. A. (n. s.) 335, 71 Atl. 296.)

There are many cases holding that the owner of an automobile is not liable for any accident that occurs when his machine is

taken out by his servant or his son without his knowledge and contrary to his orders. The question may arise, Does the owner become liable when he lends the car to a person entirely competent to drive it, whether chauffeur, son or other person, to use on an enterprise or venture in which the owner has no interest? Following the analogy of other cases there is only one answer to this question, and that is that the owner is not liable. In each case inquiry should be made, not as to whether the owner consented or did not consent to the use, but as to the nature of the use and the extent, if any, to which the business of the owner was served by such use. (See *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771; *Douglass v. Hewson*, 142 App. Div. 166, 127 N. Y. Supp. 220; *Ware v. Barataria & L. Canal Co.*, 15 La. 169, 35 Am. Dec. 189, 194; *Patterson v. Kates*, 152 Fed. 481; *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 5 L. R. A. (n. s.) 598, 107 N. W. 133; *Evans v. A. L. Dyke Automobile Supply Co.*, 121 Mo. App. 266, 101 S. W. 1132; *Lotz v. Hanlon*, 217 Pa. St. 339, 118 Am. St. Rep. 922, 10 Ann. Cas. 731, 10 L. R. A. (n. s.) 202, 66 Atl. 525; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Jones v. Hoge*, 47 Wash. 663, 125 Am. St. Rep. 915, 14 L. R. A. (n. s.) 216, 92 Pac. 433; *File v. Unger*, 27 Ont. App. Rep. 468.)

*Mr. Jesse B. Roote and Mr. J. E. Healy*, for Respondent, submitted a brief and argued the cause orally.

We do not contend that an automobile is a dangerous instrumentality, neither do we admit that it is always a harmless one; whether it is or not is a question largely dependent upon the manner in which the particular vehicle is driven. As stated in *Colborne v. Detroit United Ry.*, 177 Mich. 139, 143 N. W. 32, and as shown by the evidence herein, it may be a veritable car of Juggernaut.

We do not admit that the doctrine of master and servant as applied to Ralph and Charles Steele is in any manner a new one, or that there is anything of new growth, or of judge-made

law, characterizing it. As shown in the case of *McNeal v. McKain*, 33 Okl. 449, 41 L. R. A. (n. s.) 775, 126 Pac. 742, and in the case of *Lashbrook v. Patten*, 1 Duv. (62 Ky.) 316, 317, therein cited, the only new thing that the courts have done is to apply old and well-settled ideas to new and modern conditions. (See *Birch v. Abercrombie*, 74 Wash. 486, 50 L. R. A. (n. s.) 59, 133 Pac. 1020.) *Doran v. Thomsen*, stands alone, against the great weight of authority upon this point. *Doran v. Thomsen* is incorrectly decided, we submit; but that case is in no way opposed to the facts herein in evidence. Under the conditions here presented, the plaintiff would have recovered in *Doran v. Thomsen*, in accord with the rules there laid down. A use subject to the control of the master and connected with his affairs is the test of *Doran v. Thomsen*.

The fact that the machine was owned by the defendant and that it was being driven with the express or implied consent of the defendant is enough to create a presumption that the person in charge was the defendant's servant. (1 Shearman and Redfield on Negligence, secs. 158, 159; *Fleishman v. Polar Wave Ice & Fuel Co.*, 148 Mo. App. 117, 127 S. W. 660; *Hornstein v. Southern Boulevard R. Co.*, 79 Misc. Rep. 34, 138 N. Y. Supp. 1080.) "The burden was thus cast upon the appellants to overcome this presumption by competent evidence, and it was for the jury to say upon such evidence whether the burden has been sustained." (*Birch v. Abercrombie*, 74 Wash. 486, 50 L. R. A. (n. s.) 59, 133 Pac. 1020, 1021.) As was also the question of contributory negligence for the jury. (*Lewis v. National Cash Register Co.*, 84 N. J. L. 598, 87 Atl. 345; *Fox v. Great Atlantic etc. Tea Co.*, 84 N. J. L. 726, 87 Atl. 339; *Jessen v. J. L. Kesner Co.*, 159 App. Div. 898, 144 N. Y. Supp. 407; *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341; *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94.)

MR. JUSTICE SANNER delivered the opinion of the court.

While crossing the intersection of Columbia (or Clark) and Park Streets, in the city of Butte, Rose Amelia Lewis was struck

by an automobile and killed. The machine belonged to the defendant, but was being driven by Ralph Steele, one of his minor sons, and was conveying his sons with a party of their friends to a high school dance at the Columbia Gardens. The accident occurred about 8:35 P. M., on June 5, 1913, and the complaint, which is by the administrator of the estate of Rose Amelia Lewis, charges that her death was due to negligence in the handling of the machine, and seeks to hold the defendant liable therefor under the doctrine of *respondeat superior*.

The defendant answered, admitting the accident, but denying negligence, as well as all the allegations upon which his responsibility is sought to be based; and as a separate defense he submitted an elaborate plea the effect of which is to allege that there was no negligence, but, if there was, the plaintiff should not recover, because the injuries and death of Rose Amelia Lewis were due to her contributory negligence, the particulars of which are duly set forth. A demurrer to this plea as insufficient to constitute a defense was sustained.

Trial was to a jury. The evidence on the part of plaintiff tended to show that there was negligence in the handling of the machine, and that such negligence was the proximate cause of the accident. To establish the defendant's responsibility reliance was placed upon a deposition of defendant himself, the substance of which, so far as pertinent here, is: That he has two sons, Chester, then aged nineteen, and Ralph, then aged seventeen; that he bought the machine in May, 1912, to be used, and it was used, for the pleasure of himself and his family, and for his business when necessary; that it had been kept since September, 1912, in a garage adjoining his premises and built by him for this and other purposes, and to that garage each of his sons had a key; that his sons were taught by the salesman how to operate the machine, and "either one of them operated it generally"; that he sometimes operated the machine himself, but always in company with one or both of the boys, because he had not become sufficiently adept to trust himself with it alone. "I let the boys do the operating of it at all times, especially

when I went out with my family and on other occasions. In fact, the boys operated the machine a great deal without me being present in the machine, and I knew that. I did not know they operated it for their own uses, purposes and pleasure whenever they chose to do so. They usually consulted me if they wanted to go out with it or do anything with it, \* \* \* and that was the case on the 5th day of June, 1913. They had consulted with me about the use of it, and I had given them the machine to use on that day, and upon that occasion. At that particular time they were to take a party of their own friends out to the Gardens, and it had been arranged that Chester was to bring the machine back and take my wife and I out to the Gardens after they had taken their friends out there. \* \* \* I did not give this permission to both of the boys, to both Ralph and Chester, but gave it to Chester several days before with the understanding that they were to take a party of their own friends out to the Gardens. \* \* \* There was to be a dance at the Gardens called the 'Junior Prom' of the high school, which was the occasion of speaking of this in advance. Both of these boys were not high school boys, but one of them, Ralph, was in the high school. Q. \* \* \* Was it the desire of yourself and your family to participate in this dance at the Gardens or be present at it in consequence of the fact that Ralph was a member of the high school; that is, that he was attending the high school? A. Yes. \* \* \* I never kept track of how often Ralph ran this machine in my presence; it was quite often. The boys ran the machine indifferently, at one time one, and at one time the other. \* \* \* I did not see the machine leaving my house on June 5, 1913, and did not know at that time which of the boys was running the machine. I knew and had consented to either or both of the boys running the machine at any time. \* \* \* I do know that Chester was to run the machine back. It was spoken of that Chester should run it back on that evening, and the matter of Ralph running it out was spoken of, too, but not to me. I had told Chester that he could run the machine, but Mrs. Steele got

Chester to consent to Ralph running the machine to the Gardens. She subsequently informed me of this arrangement. My impression is it was after the machine left for the Gardens. Ralph was to run the machine on the outward trip to Columbia Gardens, and Chester back, to bring myself and my wife out. \* \* \* I did not employ any other chauffeur or person to operate or run this automobile than the two persons that we have mentioned. \* \* \* I did not consider those persons employed. \* \* \* I consider an employee is one you pay money to."

The evidence on the part of the defendant tended to rebut that of the plaintiff upon the issue of negligence, and also, to some slight degree, that upon the issue of responsibility. In connection with the latter, however, the testimony of Chester Steele makes it perfectly clear that the machine left, with its load, from defendant's home, and that Ralph was then driving.

The verdict awarded the plaintiff \$10,000, and defendant's motion for new trial was denied on the condition—which was accepted—that the plaintiff remit \$4,000. Judgment being entered for \$6,000 and costs, the defendant has appealed therefrom, as well as from the order denying him a new trial.

Sixty-two alleged errors are assigned, but the principal questions presented are whether the demurrer to the defendant's plea of contributory negligence was properly sustained, and whether there was sufficient evidence to establish *prima facie* the responsibility of defendant.

1. The answer to the first of these questions may be found in [1] *Day v. Kelly*, 50 Mont. 306, 311, 146 Pac. 930, 931, wherein this court, holding that a plea of contributory negligence may be coupled with a denial of primary negligence, said: "The plea of contributory negligence, when coupled with a denial, is always hypothetical in effect, if not in form, and amounts to no more than this: I deny absolutely that I am guilty of negligence; but assuming, without admitting it, that some act of mine was negligent in character and proximately contributed to plaintiff's injury, nevertheless plaintiff's negligent acts

united with my act to produce the injury, and without which the injury would not have occurred." Again, in *Nelson v. Northern Pacific Ry. Co.*, 50 Mont. 516, 531, 148 Pac. 388, 392; it was recognized that a plea of contributory negligence might be coupled with a denial of negligence, and the view expressed that when so made, the plea "involves merely a hypothetical admission, and does not in any measure relieve the plaintiff of the burden of proving negligence on the part of the defendant in some one or more of the particulars alleged in the complaint." This being so, the plea at bar, which does in express terms exactly what we have twice said its office is to do, cannot be deemed legally insufficient.

There is some insistence by the respondent that no prejudice [2] was occasioned by this ruling, because there was evidence suggesting contributory negligence, and instructions were given upon that subject. Counsel ignore the necessary legal effect of the ruling, which was to render inadmissible any evidence on contributory negligence considered as a defense; or, in other words, to take that question out of the case unless raised or suggested by the plaintiff's own proof. That it was raised incidentally, and that instructions upon the subject may have thereby been justified, does not cure the error in depriving the defendant of the right, from his point of view, to bring that matter into prominent relief as an affirmative defense to be supported by all the competent evidence he could muster, and to be considered by the jury as a positive and efficient element in the case. The suggestion that "the defendant took no position which admitted that his negligence, combined with the negligence of the deceased, caused the injury," is without value, because, in the light of the above decisions, he was never required to categorically acknowledge such negligence.

2. We premise our discussion of defendant's responsibility [3] with the observations that, as "a father is not liable merely because of the relation for the torts of his child, whether the same are negligent or willful" (1 Cooley on Torts, p. 180), and as an automobile can no longer be deemed inherently dangerous



(2 R. C. L. 1190), no responsibility of the defendant for the accident in question can be successfully asserted if the machine was taken without his knowledge or consent, or, if with his consent, it was taken for a purpose foreign to that for which it was kept and customarily used (*McFarlane v. Winters* (Utah), 155 Pac. 437; *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Premier Motor Mfg. Co. v. Telford* (Ind. App.), 111 N. E. 645.) It is deducible from the evidence, however, that defendant's principal business, so far as it involved the use of the machine, [4, 5] was the pleasure of himself and his family, including his two boys, Chester and Ralph. In carrying on this business he relied upon them as drivers of the machine and exacted of them this service. They served "indifferently," first one, then the other, either of them being authorized to drive it whenever in the pursuit of family pleasure it should be driven. On the occasion in question it had not been taken surreptitiously, but was being used in the business for which it was bought and maintained, to-wit, the family pleasure; so much so that after depositing the guests it was to return to the home and complete the entire transaction by conveying the defendant and his wife to the same dance. It had not been specifically committed to Chester, but to "the boys," and the driving of it at the time by Ralph was not against the defendant's wishes, but was with his implied, if not express, assent. Whether these circumstances make a case for the application of *respondeat superior* depends upon considerations entirely beside the fact that the device employed was an automobile. That instrument is now too well established to be singled out for judicial preference or animadversion. It has taken its place among the common methods of transportation, and no good reason occurs to us, in the absence of legislation, for denying to its use the same general rules of responsibility, direct and consequential, as are applicable to other common methods of transportation, having in mind, of course, its potentialities for harm as well as good. If, there-

fore, the defendant would be holden under the doctrine of *respondeat superior* had Mrs. Lewis been run over and killed by a team reasonably safe, but, under the same conditions as to purpose and authority as are here disclosed, incautiously driven by his son, then he is responsible in this case; otherwise not. That he would be responsible in the case supposed is reasonably well settled (*Lashbrook v. Patten*, 1 Duv. (Ky.) 316; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922; *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336; *Howe v. Newmarch*, 12 Allen (Mass.), 49; *Jennings v. Schwab*, 64 Mo. App. 13; *Broadstreet v. Hall*, 168 Ind. 192, 120 Am. St. Rep. 356, 10 L. R. A. (n. s.) 933, 80 N. E. 145; *Mulvehill v. Bates*, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; *Shockley v. Shepherd*, 9 Houst. (Del.) 270, 32 Atl. 173); and there is little room to deny the same conclusion to cases like the present, since the owner of an automobile is not to be absolved, any more than he is to be held, merely because a machine instead of a team was the instrument of harm. (*McNeal v. McKain*, 33 Okl. 449, 41 L. R. A. (n. s.) 775, 126 Pac. 742; *Birch v. Abercrombie*, 74 Wash. 486, 50 L. R. A. (n. s.) 59, 133 Pac. 1020; *Kayser v. Van Nest*, 125 Minn. 277, 51 L. R. A. (n. s.) 970, 146 N. W. 1091; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Stowe v. Morris*, 147 Ky. 386, 39 L. R. A. (n. s.) 224, 144 S. W. 52; *Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125; *Geiss v. Twin City Taxicab Co.*, 120 Minn. 368, 45 L. R. A. (n. s.) 382, 139 N. W. 611.)

Defendant cited many cases to support his contention that no responsibility exists. These cases are, for the most part, against him; for they proceed upon the theory, more or less justified, that the evidence showed no service or agency, and they either tacitly or expressly admit the principle that, had agency or service been shown, liability would attach. The leading case in point against the conclusion here reached is *Doran v. Thomsen*, 76 N. J. Law, 754, 131 Am. St. Rep. 677, 19 L. R. A. (n. s.) 335, 71 Atl. 296. The criticism of this decision by the

supreme court of Washington is, to our mind, so apt and so clearly expresses the fundamental considerations involved that we subjoin it as part of our declaration of the law in this state upon the subject: "The New Jersey case, *Doran v. Thomsen* (*supra*), is not distinguishable on the facts from the case before us. The father owned the automobile, kept it on his premises, and the daughter used it with his knowledge and consent at her pleasure. While heartily subscribing to the view there expressed 'that the mere fact of the relationship of parent and child would not make the child the servant of the defendant,' we think the opinion unsound in that it ignores the agency induced by the fact, independent of that relationship, that the daughter was using the machine for the very purpose for which the father owned it, kept it, and intended that it should be used. It was being used in furtherance of the very purpose of his ownership and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency nor the service a remunerative service has no bearing upon the question of liability. \* \* \*

In running his vehicle she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule *respondeat superior*. We think that the instruction which is criticised in the *Doran Case* is in itself a complete answer to the opinion. It declared the use of the machine for the purpose for which it was owned, by the person authorized by the owner to so use it, a use in the owner's business. It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his

family or another, is his agent." (*Birch v. Abercrombie, supra.*)

3. Additional rulings of a procedural character other than as involved in the questions above discussed are assigned as error, some of which require notice.

Technically it was error, though not very substantial, to permit [6] Mrs. Barron to testify to the usual charge by Christian Science practitioners, in the absence of a showing that Mrs. Lewis was accustomed to make such charges.

Nor should the court have stricken Chester Steele's answer [7] to the effect that the appearance of Mrs. Lewis was so sudden the machine could not have been stopped in time to avoid striking her even if its speed had not exceeded four miles an hour; he was sufficiently qualified to speak, and the answer tended to show that the accident was not due to excessive speed, assuming that speed to have been eight or ten miles an hour, as claimed by the defendant.

We also think it was proper for the defendant to show, as he [8] attempted to do by Kiser, that, when first descried by the occupants of the automobile, Mrs. Lewis' actions were such as to create the impression that she was waiting for the west-bound car, and would therefore have no occasion to cross the intersection of Park and Columbia Streets.

To avoid the prejudice which might arise from the imputation [9] of heartlessness or undue haste occasioned by the fact that the machine proceeded to the Columbia Gardens, and that Ralph Steele there danced once or twice, the defendant sought to show that inquiry had been made by Chester Steele at the house of Mrs. Lewis and was informed that her injuries were not serious. This, under the circumstances, should have been permitted, in our opinion. What Ralph did at the Gardens was wholly immaterial, but, having been shown, the defendant was entitled to offset its effect. The jury should have been directed, as requested by offered instruction No. 30a, to ignore it altogether.

As the record is presented, we find no merit in the other assignments. Many of them relate to evidence or instructions

touching contributory negligence, which, as a defense, was not in the case, and these doubtless will not recur.

The judgment and order appealed from are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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LAHOOD, RESPONDENT, v. CONTINENTAL TELEGRAPH  
CO. ET AL., APPELLANTS.

(No. 3,642.)

(Submitted March 27, 1916. Decided April 28, 1916.)

[157 Pac. 639.]

*Telegraphs—Fraudulent Delay in Transmission—Liability—  
Tort of Agent—Liability of Company—Punitive Damages—  
Statutes—Action on Contract or in Tort—Waiver—Stipula-  
tions on Telegraph Blank—Applicability.*

*Telegraphs—Negligence in Transmission—Action on Contract or in Tort.*

1. One sustaining damage through the negligence of a telegraph company in transmitting or delivering a message may sue upon the contract if one exists between him and it, or waive the contract and sue in tort.

[As to recovery for failure of telegraph company to send or deliver message, see note in 10 Am. St. Rep. 778.]

*Same—Tort of Agent—Punitive Damages—Liability of Company.*

2. A telegraph company may be made to respond to punitive damages for its agent's misconduct, even though the wrongful act was unauthorized and not ratified by it.

*Same—Fraudulent Delay—Punitive Damages—Statutes.*

3. Where the element of fraud entered into the wrongdoing of a telegraph operator in withholding messages to and from a customer of his company, thus enabling him to profit by it, the provisions of section 6047, Revised Codes, awarding the right to punitive damages, governed, and section 5363, which allows the injured person \$50 in addition to his actual damages, did not.

*Same—Repeating Messages—Applicability of Stipulation.*

4. The provision on a telegraph blank for repeating messages to avoid mistake has no application to a case in which damages are sought for fraudulent delay in transmission.

Same—Claims for Damages—Presentation of—Applicability of Stipulation.

5. The stipulation on a telegraph blank that the company will not be liable for damages or statutory penalties where claim is not presented within sixty days after filing the message for transmission, applies only to claims arising from negligence, and not to one of the character mentioned above.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Shadan Lahood against the Continental Telegraph Company and another. Judgment for plaintiff and defendants appeal from it and from an order denying them a new trial. Affirmed.

*Messrs. Shelton & Furman and Mr. A. J. Verheyen, for Appellants, submitted a brief; Mr. Fred J. Furman argued the cause orally.*

In the case at bar, the jury's verdict was general, and it is impossible to determine from the verdict whether the entire amount was intended to be compensation for damage actually suffered or whether some portion of the verdict was intended to be punitive damages. That being the case, the situation is exactly that of *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97, 13 Sup. Ct. Rep. 261, which holds that a corporation is not liable to exemplary or punitive damages for acts which it did not authorize and has not ratified. (See, also, *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Rouse v. Metropolitan St. Ry. Co.*, 41 Mo. App. 298.)

The statute fixes the measure of damages and provides the penalty in cases of this kind. (Rev. Codes, secs. 5363, 6048; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594.)

The evidence does not justify the verdict. With respect to this contention, appellants respectfully urge: The provisions contained in the stipulations on the telegraph blanks on which these messages were written out respecting the measure of damages which could be claimed, and the time (sixty days) within which

claims must be made, are reasonable. (*Wheelock v. Postal Telegraph-Cable Co.*, 197 Mass. 119, 14 Ann. Cas. 188, 83 N. E. 313; *Forney v. Postal Telegraph-Cable Co.*, 152 N. C. 494, 67 S. E. 1011; *Barnes v. Postal Telegraph-Cable Co.*, 156 N. C. 150, 72 S. E. 78; *Western Union Tel. Co. v. Hollis*, 28 Okl. 613, 115 Pac. 774; *Stone & Co. v. Postal Telegraph Co.*, 31 R. I. 174, 29 L. R. A. (n. s.) 795, 76 Atl. 762; *Toale v. Western Union Tel. Co.*, 83 S. C. 41, 64 S. E. 963; *Sykes v. Western Union Tel. Co.*, 150 N. C. 431, 64 S. E. 177.) A stipulation on a message blank which provides that every claim must be presented within thirty days has been held valid. (*Grant v. Western Union Tel. Co.*, 154 Mo. App. 279, 133 S. W. 673.) Unless there is a statutory provision invalidating, by its very terms, stipulations of this kind, there is no doubt but that the foregoing cases recite the law respecting these stipulations.

On the question of the amount of damages recoverable, the case of *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. Rep. 1098, is directly in point. The court there reaches the conclusion that a stipulation providing that unless the sender orders the telegram repeated back to the original station for comparison and pays half that sum in addition, the liability attaching to the telegraph company will be no more than the amount paid for the transmission of the telegram, is a reasonable and valid stipulation and provision as between the parties. (2 Thompson on Negligence, secs. 2411, 2429, 2431, 2438; *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221, 26 Am. St. Rep. 33, 11 L. R. A. 102, 15 S. W. 468.) There is no contention made on the part of the plaintiff that he did not know of and consent to the stipulation, the only contention in that respect being that the stipulations are unreasonable, no claim being made that he did not fully know all about the stipulations. The case of *Stone & Co. v. Postal-Telegraph Co.*, 31 R. I. 174, 29 L. R. A. (n. s.) 795, 76 Atl. 762, holds that a stipulation that notice of a claim for damages for delay in transmission and delivery must be given within sixty days from the date of the message is reasonable and binding.

(See, also, *Barnes v. Postal Telegraph-Cable Co.*, 156 N. C. 150, 72 S. E. 78.)

*Messrs. Lew. L. and E. J. Callaway and Mr. E. B. Howell*, for Respondent, submitted a brief; *Mr. Lew. L. Callaway* argued the cause orally.

"It has been held by some courts that, when a contract was made with one of these companies to send a message and it negligently transmitted or delayed in delivering the message, the company was guilty of a breach of contract and the sender's action should be in contract. But the weight of authority is that the sender may maintain an action for the breach of the contract, or he may proceed against the company for the breach of its public duty or sue in tort. We are inclined to think that the latter view is the correct one." (Jones on Telegraph & Telephone Cos., sec. 468; *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 48 Am. St. Rep. 604, 30 L. R. A. 444, 18 South. 425; *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507, 25 L. R. A. 406, 59 N. W. 1078; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63; *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342, Am. Rep. 41, 11 N. W. 356, 911.)

The telegraph company is a primary tort-feasor, and exemplary damages are recoverable against it. The old doctrine that the company would not be liable in a case of this kind unless it ratified the act of its agent has long since been exploded. In *Richberger v. American Express Co.*, 73 Miss. 161, 55 Am. St. Rep. 522, 31 L. R. A. 390, 18 South. 922, the supreme court of Mississippi held that the old doctrine of *McManus v. Crickett*, 1 East, 106, 102 Eng. Reprint, 43, in which it was held that the master is never liable for the willful or malicious act of his servant, has long since been repudiated, and expressly overruled the case of *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264, and *New Orleans, J. & G. N. Rue Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356. (See, also, *Butler v. Western Union Tel. Co.*, 65 S. C. 510, 44 S. E. 91; *Hellams*



v. *Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12.) Two cases especially applicable to the one at bar are *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 12 Am. St. Rep. 636, 1 L. R. A. 143, 144, 39 N. W. 315, and *Pacific Postal Tel.-Cable Co. v. Bank of Palo Alto*, 109 Fed. 369, 54 L. R. A. 711, 48 C. C. A. 413. In the last case cited the opinion is by Judge Hawley and there is an exhaustive citation of authorities. The facts show fraud on the part of the appellants, and under subdivision 4 of section 6449, Revised Codes, the cause of action therefor is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. (Jones on Telegraph and Telephone Cos., sec. 392; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.) The case of *Gulf Coast & S. F. Ry. Co. v. Todd* (Tex. App.), 19 S. W. 761, was very similar to the present one. The contents of a telegram had been secretly disclosed by the telegraph agent, resulting in damage to the sender. The latter did not discover the wrong until the sixty-day period had expired. But the court held that the sender was not bound by the stipulation. (37 Cyc. 1690; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Conrad v. Western Union Tel. Co.*, 162 Pa. St. 204, 29 Atl. 888; *Sweatland v. Illinois & M. Telegraph Co.*, 27 Iowa, 433, 1 Am. Rep. 285.)

But the stipulation as to respondent was void anyhow. In *Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339, the court laid down the rule that a telegraph company cannot stipulate that it will not be liable for damages on account of negligence in the delivery of a message unless a claim therefor in writing is presented within sixty days from the date of the receipt of the message. (3 Sutherland on Damages, 296; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 248, 96 Am. Dec. 519; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, *Candee v. Western Union*

*Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In April, 1912, F. H. Tyro was the agent for the Continental Telegraph Company at Jefferson Island station, and Shadan Lahood was engaged in the mercantile business at the same place. On April 8 Lahood had an inquiry from the Gamble-Robinson Fruit Company for three carloads of potatoes, and in reply thereto telegraphed quoting prices. About noon of the same day he received a telegram from the fruit company to send three carloads at once and wire just what he could do. At 1:55 P. M., Lahood wired that one carload had been sold to another concern before the fruit company's telegram arrived, and inquired what top price the company would pay. As agent for the telegraph company in charge of their office, Tyro had sent and received these messages and knew their contents. At the time he sent Lahood's message at 1:55 P. M. on April 8 he also sent one on his own account as follows:

"To Gamble-Robinson Fruit Co., Miles City, Mont.:

"What will you give me commission if I get you a car No. 1 white stock f. o. b. Jefferson Island at one ninety-five. Deal confidential. None of Lahood's prospects. Ship at once.

"F. H. TYRO."

About 4:35 of the same day the Gamble-Robinson Fruit Company telegraphed to Lahood that it would pay \$2.10 per hundred-weight, and added: "Let me know at once as have another deal on in the Bitter-root." At the same time it wired Tyro: "Offer you two-ten. Wire quick if that is all right." Instead of delivering Lahood's message at once, Tyro retained it in his possession, arranged for a car of potatoes on his own account, and at 5:45 P. M. wired the fruit company that he accepted its offer and would ship on the second or third day following.

Then at about 8 P. M. he delivered Lahood's message, and Lahood, in ignorance of Tyro's double-dealings, immediately purchased two carloads of potatoes, and the same evening delivered to Tyro for transmission to the fruit company this message: "Load two cars Monday at price named." This telegram Tyro held up, and on the morning of the ninth wired the fruit company as follows:

"Gamble-Rob. Fruit Company, Miles City, Mont.:

"Can you handle another car of spuds at two ten? Load first car to-morrow. What are shipping instructions on this car?  
F. H. TYRO."

—and about noon received in reply the following:

"F. H. Tyro, Jefferson Island, Montana:

"Wire received. Answer yes. Ship both cars to us Miles City.  
GAMBLE-ROBINSON FRUIT COMPANY."

Some time in the evening of the 9th, Tyro sent the message which Lahood had delivered to him the day before, and on the 10th the fruit company wrote Lahood that it had purchased elsewhere and could not use his potatoes. Tyro shipped the two carloads on his own account and made a net profit of about \$100. Lahood after great effort and at great loss disposed of most of his potatoes, and brought this action to recover damages, and prevailed in the lower court. From the adverse judgment and from an order denying a new trial, the defendants appealed.

The information which Tyro received concerning the business requirements of the Gamble-Robinson Fruit Company, and which prompted his duplicity to his own profit and Lahood's loss, belonged to Lahood, who had paid for it. It was confidential in the strictest sense of the term, and could not be used or disclosed by the telegraph company or its agent. In using it to undermine his company's customer and to secure the profit from the transaction for himself Tyro was not merely guilty of perpetrating a gross fraud upon Lahood, but, according to his own account, he was guilty of a crime for which he should have suffered severe punishment. Section 8824, Revised

Codes, provides: "Every agent, operator, or employee of any telegraph office, who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to another person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit, or advantage, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or by both fine and imprisonment."

That Tyro is liable to Lahood for exemplary damages as well as for damages by way of compensation is settled by our Codes. Section 6047 provides: "In any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

So likewise is Tyro's principal, the telegraph company, liable for compensatory damages; but it is insisted that the trial court erred: (1) In holding the telegraph company liable in punitive damages; and (2) in fixing the measure of recovery.

1. It is urged that the telegraph company is not liable for [1] punitive damages in this instance: (a) Because this is an action for the breach of a contract to transmit and deliver the messages referred to, and section 6047 is not applicable; (b) because the telegraph company is not charged as a primary tort-feasor, and never authorized Tyro's wrongful acts in the first instance, nor ratified them thereafter.

(a) At the time these messages were sent and received the defendant telegraph company was a carrier of messages for hire, holding itself out as such and soliciting the business of the public generally. While the application of the science of electricity to the transmission of intelligence is of comparatively

recent date, the importance of the function which the magnetic telegraph has performed in the commercial and social life during the last half century particularly has received recognition in rules and regulations adopted to define the rights and liabilities of the telegraph company, and which collectively may justly be termed the common law upon the subject. It is too well settled to admit of further debate that a telegraph company is not a common carrier unless made such by express statute. Our own Codes define "common carrier" (section 5332, Rev. Codes), and distinguish between a common carrier of messages and a carrier of messages by telegraph or telephone. While the telegraph company is not an insurer of the speedy and accurate transmission of a paid message, it is engaged in the performance of a public service, owes to the general public a well-defined duty, and in return enjoys the privilege of exercising the power of eminent domain. It is held to the exercise of ordinary care and diligence, and for its negligence may be compelled to respond in damages. Though its engagements with its customers may be, and generally are, evidenced by contract, its duty arises from the public character of its business, and its responsibility is not dependent upon the existence of an agreement. The customer injured through the negligence of the telegraph company in transmitting or delivering his message may sue upon the contract, if one exists, but he is not limited to that remedy. He may sue in tort. This is the modern rule, now recognized generally. (*Jones on Telegraph and Telephone Cos.*, sec. 468.) It is analogous to the principle applied to common carriers. (*Wall v. Northern Pac. Ry. Co.*, 50 Mont. 122, 145 Pac. 291; *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642.)

(b) Appellants' contention that the telegraph company cannot be made to respond in punitive damages for its agent's misconduct in the absence of proof that the wrongful acts were authorized or ratified, finds some support in authorities from other jurisdictions; but the contrary doctrine is now settled as the rule of decision in this state. (*Grorud v. Lossel*, 48 Mont.

274, 136 Pac. 1069; *Burles v. Oregon S. L. Ry. Co.*, 49 Mont. 129, Ann. Cas. 1916A, 873, 140 Pac. 513.)

2. Measure of damages as affected: (a) By statute; (b) by agreement.

(a) *By statute.* Section 5361, Revised Codes, prescribes the [3] duties of a carrier of messages by telegraph or telephone. Section 5362 designates the order in which messages must be transmitted by a common carrier, and section 5363 provides that the person whose message is refused or postponed contrary to the provisions of the chapter is entitled to recover from the carrier his actual damages and \$50 in addition thereto. These provisions do not apply here, but merely fix the measure of recovery in the ordinary negligence case where the circumstances are not aggravated by the presence of the elements of fraud, malice or oppression. Under the allegations of this complaint and the proof in support of them, plaintiff's right to punitive damages is governed by section 6047, above.

(b) *By agreement.* Upon the telegraph blanks used by this [4] plaintiff for the text of his messages two provisions were printed over the heading, "All messages taken by this company are subject to the following terms." The first provides for repeating the message to avoid mistake, but it can have no possible bearing in a case of this character, where the wrongful acts consist in fraudulently delaying messages and appropriating their contents to the use of the telegraph company's agent. If this action arose over a mistake in transmission, then the effect of that provision might require consideration. The second stipulation indorsed on the telegraph blank follows: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." It is conceded that plaintiff did not make any demand upon or present any claim to the telegraph company [5] until approximately a year after the transactions complained of; his excuse for the delay being that he did not discover the fraud until the last of January, 1913. He did, how-

ever, make demand within sixty days after such discovery. If mere delay in transmission or delivery of a message furnishes the only ground of complaint in an action for damages for breach of contract, the provision above might possibly be invoked to defeat recovery when there has been unreasonable delay in making known the cause of complaint; but, as we have already determined, this action does not sound in contract in the first instance, and in the second place a telegraph company cannot defend against the fraud or crime of its agent by a stipulation which does not allow for time for the discovery of the wrongful acts. In making such a stipulation the company certainly did not contemplate that its agent would be guilty of gross fraud or serious crime. It was merely undertaking to guard against stale demands founded upon negligence. Our conclusion is that the stipulation refers only to claims arising from negligence, and therefore is not applicable here. If it was ever intended as a cloak for fraud or crime, we should have no hesitation in holding it void as against public policy. (Rev. Codes, sec. 5052.)

Complaint is made of instruction 8, and, if it stood alone, its inaccuracy might lead to serious consequences; but its defects are negative rather than affirmative; it is deficient rather than positively erroneous; and, when read in connection with instruction 10a, we think it could not have misled the jury to defendants' prejudice.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied May 22, 1916.

## SMITH, APPELLANT, v. MCCORMICK ET AL., RESPONDENTS.

(No. 3,646.)

(Submitted March 28, 1916. Decided April 28, 1916.)

[157 Pac. 1010.]

*Default Judgments—Setting Aside—Insufficient Showing—Expiration of Time Limit—Cities and Towns—Fire Department—State Fire Marshal—Destruction of Private Property—Police Power.*

*Default Judgments—When Vacation Error.*

1. Under section 6589, Revised Codes, a default may not be vacated in any case, upon the expiration of six months after its entry.

*Same—Insufficient Showing.*

2. An affidavit in support of a motion to set aside a judgment entered for want of appearance, which did not state when defendant first learned that judgment had been taken against him; that it had been taken through his inadvertence, mistake or excusable neglect; that it exceeded the fair value of the property sued for; or allege facts constituting a defense, held insufficient to move the trial court's discretion to vacate the judgment.

[As to right to have default judgment set aside after satisfaction thereof, see note in Ann. Cas. 1914D, 233.]

*Cities and Towns—Police Power—Destruction of Private Property—State Fire Marshal.*

3. To warrant a city in destroying, through its chief of the fire department, under its police power, or the state fire marshal in ordering destroyed, private property for the public welfare, facts constituting an emergency justifying an invasion of private rights must appear; hence it was no defense for a chief of a city fire department, in an action to recover damages for the destruction of a building, to aver, without stating facts, that he obeyed the orders of the state fire marshal in acting as he did.

*Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.*

ACTION by Pat P. Smith against John F. McCormick and Thomas Daly. From an order setting aside a default judgment on application of defendant Daly, plaintiff appeals. Reversed.

Mr. Wellington D. Rankin, for Appellant, submitted a brief and argued the cause orally.

Mr. Ed. Horsky, for Respondents, appearing as *amicus curiae*, submitted a brief and argued the cause orally.



MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In this action personal service of summons was made upon defendant Daly on August 21, 1913, and his default entered on September 11, for want of an appearance. Thereafter proof was submitted by the plaintiff and a verdict in his favor returned and judgment entered. On June 5, 1914, defendant Daly moved the court to set aside the default and permit him to answer. The motion was granted and plaintiff appealed.

Section 6589, Revised Codes, authorizes a court to set aside [1] a default entered through mistake, inadvertence, surprise or excusable neglect, provided application therefor be made within a reasonable time, but in no case exceeding six months after such default was entered. In *State ex rel. Happel v. District Court*, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (n. s.) 1098, 99 Pac. 291, we considered this section, and concerning its meaning and effect said: "Under the statute (Rev. Codes, sec. 6589), the motion in such cases must be made within a reasonable time after the date of the entry of judgment, but in no case exceeding six months, and the statute is the limit of the court's power in such cases. After the expiration of the time fixed therein, the power of the court over the judgment absolutely ceases, and it is without jurisdiction to vacate or modify it." That construction was approved and adopted in *State ex rel. Smotherman v. District Court*, 51 Mont. 495, 153 Pac. 1019.

Upon the expiration of six months from the entry of default, the authority of the court over it ceased and the order made more than nine months after September 11, 1914, is void for want of jurisdiction in the court to make it, and for that reason is reversed.

*Reversed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## ON MOTION FOR REHEARING.

(Submitted May 22, 1916. Decided June 3, 1916.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Defendant has moved for a rehearing, and, directing our attention to the fact that the order from which the appeal was taken was dual in character in that it vacated the judgment and set aside the default, insists that we disposed of it only so far as it affected the default, leaving undetermined the question of the validity of the order vacating the judgment. In this defendant is mistaken. While the order of the district court had a dual purpose, it was one order only, and that order we reversed in its entirety.

The motion made in the lower court had the like dual character [2] and was supported by an affidavit, but without any answer tendered. We confined our attention to the order as affecting the default because the affidavit is confined exclusively to that subject—to an attempt to excuse appellant's failure to appear in the action by answer or other pleading. The order, in so far as it set aside the judgment, is so palpably indefensible that we deemed it unnecessary to make special reference to it. Assuming that the motion for that purpose was in time, the court was without authority to act except upon a proper showing: (1) That the judgment was taken against appellant through his mistake, inadvertence, surprise or excusable neglect; (2) that the judgment, if permitted to stand, will affect him injuriously; and (3) that he has a defense upon the merits. The facts constituting the defense may appear from the affidavit or proposed answer, where one is tendered. These rules have been reiterated so often by this court that a citation of the authorities is unnecessary.

The affidavit does not apprise the court when defendant first learned that a judgment was about to be, or had been, taken against him. For aught that appears from this affidavit, defendant or his counsel may have been in court during the time the

trial was in progress. There is not the faintest suggestion that the judgment itself was taken through defendant's inadvertence, mistake or excusable neglect. Neither is there a suggestion in the affidavit that the amount of the judgment exceeds the fair value of the property destroyed. Finally, there are not any facts stated which constitute a defense. In his affidavit defendant does say that in destroying plaintiff's property he acted in his capacity as chief of the Helena fire department and deputy state fire marshal, and not otherwise, and that the state fire marshal had condemned the buildings "as being dangerous to life and property of the inhabitants of the city of Helena," and these are the only facts proffered as a defense.

There are certain circumstances under which the city of [3] Helena, acting through the chief of its fire department and within its police power, may destroy private property for the public welfare; but the police power acts only in emergencies, and the facts constituting the emergency must be made to appear before the invasion of private rights can be justified. The chief of a fire department merely by virtue of his office has no more right to destroy private property than has anyone else, and to constitute a defense for his act when he does so, he must disclose the facts which constitute the emergency under which the exercise of the police power will justify such extreme measure. It is not any defense to say that the state fire marshal has condemned plaintiff's buildings; for unless the facts surrounding the property were such as to properly invoke the police power, the act of the fire marshal would not protect him or anyone acting upon his authority.

We have elaborated our views thus far to demonstrate that the affidavit was altogether insufficient to move the trial court's discretion to vacate the judgment.

The motion for rehearing is denied.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WARD, RESPONDENT, v. STATE BANK OF YATES,  
APPELLANT.

(No. 3,657.)

(Submitted March 31, 1916. Decided April 28, 1916.)

[157 Pac. 573.]

*Banks and Banking—Dishonoring Checks—Damages Recoverable.*

1. Substantial damages, temperately measured, may be awarded, in an action against a bank for wrongfully dishonoring a check, even though evidence of tangible loss was not introduced.

[As to bank's liability for failure to honor check, see note in 80 Am. St. Rep. 865.]

*Appeal from District Court, Dawson County, in the Seventh Judicial District; Roy E. Ayers, of the Tenth District, Judge presiding.*

ACTION by C. E. Ward against the State Bank of Yates. Judgment for plaintiff and defendant appeals. Affirmed.

Messrs. Loud, Collins, Campbell, Wood & Leavitt, for Appellant, submitted a brief; Mr. Chas. H. Loud argued the cause orally.

Cases such as this are rare, and not many decisions can be cited as bearing directly upon this question. One of the earliest and best considered cases clearly holds that the action is founded on a contract, and that in the absence of proof of special or actual damages, the plaintiff is only entitled to recover nominal damages. (*Marzetti v. Williams*, 1 Barn. & Ad. 415, 109 Eng. Reprint, 842; *Mecham's Cases on Damages*, p. 9.) The trial court adopted and followed the rule announced in the following cases: *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190; *Svensden v. State Bank*, 64 Minn. 40, 58 Am. St. Rep. 522, 31 L. R. A. 552, 65 N. W. 1086; *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 15 L. R. A. 134,

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As to liability of bank for refusal to pay check when having funds therefor, see note in 15 L. R. A. 137.

28 N. E. 917. The rule announced by these cases is that the refusal of the bank to pay a check, when the depositor has sufficient funds to meet it, amounts to a slander of the merchant or trader in his business, and he is entitled to recover general compensatory damages. We submit that a bank's refusal to pay the check of a merchant, when properly presented, does not amount to a slander of the merchant, and that an action for slander could not be maintained upon such a state of facts. The measure of damages for a breach of a contract is provided by sections 6048 and 6049 of the Revised Codes. We cannot understand, in the light of these two sections, how a man who admits that he has received no damage should be entitled to general damages in a case where the record shows that all parties concerned, and particularly the parties who returned the check and notified him of its dishonor, were fully cognizant of the real facts of the case. A verdict for nominal damages is the only verdict that should have been rendered in this case, and the court should have so instructed the jury.

*Mr. F. P. Leiper*, for Respondent, submitted a brief and argued the cause orally.

While there is some authority for appellant's position, the greater weight of authority upholds the theory on which the case was tried. A leading case in support of respondent's position is that of *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 80 Am. St. Rep. 857, 51 L. R. A. 255, 58 S. W. 261. In that case the court holds that an action such as the case at bar is an action in tort, and not in contract; that the injury done to a depositor by the refusal of a bank to pay his check, when there are funds to cover, is in the nature of a slander of the depositor's credit and financial standing, for which he is entitled to substantial damages. (See, also, *Svensen v. State Bank*, 64 Minn. 40, 58 Am. St. Rep. 522, 31 L. R. A. 552, 65 N. W. 1086; *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 15 L. R. A. 134, 28 N. E. 917; *First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30, 55 Pac. 277; *Patterson v. Marine Nat.*

*Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 779, 18 Atl. 632; 5 Am. & Eng. Ency., 2d ed., 1059; 1 Cooley on Torts, 3d ed., 296; *Siminoff v. Jas. H. Goodman Co. Bank*, 18 Cal. App. 5, 121 Pac. 939.)

MR. JUSTICE SANNER delivered the opinion of the court.

On November 25, 1912, the plaintiff, a general merchant of Yates, Montana, drew his check for \$25.55 upon the defendant, a state banking corporation, payable to Kelly-How-Thompson [1] Company, of Duluth, Minneapolis. The check was sent to the payee, and thereafter, through the Clearing-house Association of Helena and the Northern Express Company presented for payment on or about December 4, 1912. Payment was refused, although the plaintiff had, at the time it was drawn and at the time it was presented for payment, ample funds in the defendant bank to pay the same. This action was brought for damages on account of such refusal. Issues were joined, and the cause was tried to a jury, who found for the plaintiff. Judgment was entered on the verdict, and, defendant's motion for new trial being denied, these appeals are the result.

The principal contention is that prejudicial error occurred in certain rulings touching the measure of plaintiff's recovery, the case being tried and submitted on the theory that substantial damages, temperately measured, might be awarded notwithstanding plaintiff's failure to submit any evidence of tangible loss. There was no error in this. (*Crites v. Security State Bank*, ante, p. 121, 155 Pac. 970.)

The other assignments present no ground for reversal. The judgment and order appealed from are therefore affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

## STATE, RESPONDENT, v. TURNMIRE, APPELLANT.

(No. 3,777.)

(Submitted March 31, 1916. Decided April 29, 1916.)

[157 Pac. 579.]

*Licenses—Itinerant Venders—Complaint—Sufficiency.*

1. Complaint in an action to recover a license fee under Chapter 110, Laws 1911, the manifest import of which was that defendant, without first procuring a license, engaged in the business of itinerant vender, and in the business of soliciting orders, *held* sufficient to charge liability for the license as itinerant vender at least, and that therefore a demurrer to the pleading was properly overruled.

[As to statutory regulation of itinerant physicians and venders of drugs, see note in *Ann. Cas.* 1913D, 1242.]

*Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.*

ACTION by the State against E. E. Turnmire. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Cause submitted on briefs of Counsel.

*Mr. J. D. Taylor*, for Appellant.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, for Respondent.

MR. JUSTICE SANNER delivered the opinion of the court.

Action by the state to recover of E. E. Turnmire \$300 unpaid license, \$15 damages and costs based upon the following [1] allegations: "That from and since the 1st day of January, 1915, to and including August 20, 1915, in the county of Ravalli, state of Montana, the above-named defendant did conduct, carry on and engage in the business of an itinerant vender. That during all of said time he was engaged in traveling about from place to place in said county of Ravalli, state of Montana, by means of a team of horses and vehicle, and did during all of said time transport, exhibit and offer for sale, and sell and de-

liver, as an itinerant vender, to various persons and at divers times, goods, wares and merchandise, to-wit, patent medicines, toilet articles, soaps, flavoring extracts and spices, and said defendant did, during all of the time and at the county and state aforesaid, solicit orders from various persons and at divers times during said period aforesaid, for the future delivery of goods, wares and merchandise, both with and without sample, without first having obtained a license so to do, from the county treasurer of Ravalli county, state of Montana." The defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, which demurrer having been overruled, he refused to further plead and suffered judgment to be entered according to the plaintiff's prayer.

This appeal is from that judgment, and the contention is that the demurrer should have been sustained for these reasons: That the defendant is sought to be charged with liability under Chapter 110, Laws of 1911, in two particulars, viz.: Soliciting orders and pursuing the business of itinerant vender. That the charge of soliciting orders is complete since the allegation is that this was done without a license, but is ineffectual because the statute, in so far as it assumes to license or prohibit the soliciting of orders, is unconstitutional. That the charge of itinerant vending is incomplete, since it is not alleged that this was done without a license.

The ruling assailed was correct. The complaint is not a model, but its manifest import is that the defendant, without first procuring a license, engaged in the business of itinerant vender and in the business of soliciting orders. Therefore, whatever may be said of the provisions of the statute relating to soliciting orders, the complaint is sufficient to charge liability for the license as an itinerant vender.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.



## DE SANDRO, RESPONDENT, v. MISSOULA LIGHT &amp; WATER CO., APPELLANT.

(No. 3,648.)

(Submitted March 29, 1916. Decided May 3, 1916.)

[157 Pac. 641.]

*Personal Injuries—Master and Servant—Expert Witnesses—Hypothetical Questions—Removal of Causes—Bill of Exceptions—Record on Appeal.*

Appeal and Error—Removal of Causes—Bill of Exceptions—Record on Appeal.

1. An order denying a petition to remove a cause to the federal court cannot be reviewed on appeal where it is not brought into the record by bill of exceptions with the petition and bond, properly authenticated.

Personal Injuries—Expert Witnesses—Who may be.

2. In an action to recover damages sustained by the caving in of a ditch while plaintiff was at work, laborers who had experience in digging trenches for gas and water pipe and in excavating for buildings could properly testify as experts as to where in the ditch, in their opinion, the fall of earth first began.

[As to qualification of witness to testify as expert as resting in discretion of trial court, see note in *Ann. Cas.* 1912D, 817.]

Same—Hypothetical Questions—Procedure.

3. In putting a hypothetical question to a witness, counsel may assume as established all the facts in evidence tending directly or by fair inference to establish his theory of the case, and need not include all the evidence on the subject, opposing counsel having the privilege of including such matters as he deems improperly omitted, in questions propounded by himself; whereupon it is the province of the jury to say whether the facts assumed by the questions were established and whether the opinion based on them has any probative value.

*Appeal from District Court, Missoula County; J. E. Patterson, Judge.*

ACTION by Angelo De Sandro against the Missoula Light and Water Company, and another. Judgment for plaintiff, and defendant corporation appeals from it and an order denying it a new trial. *Affirmed.*

*Messrs. W. M. Bickford, Wm. L. Murphy and Wm. Wayne, for Appellant, submitted a brief; Mr. Murphy argued the cause orally.*

Upon the second trial of this case there were but two parties, to-wit: Angelo De Sandro, a citizen of Montana, plaintiff, and

the Missoula Light and Water Company, a citizen of Washington, defendant, presenting a clear case of diversity of citizenship upon which the defendant was absolutely entitled to a removal of the cause into the federal court upon application made at the first opportunity. (*Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. Rep. 264; *Boatmen's Bank v. Fritzlen*, 75 Kan. 479, 22 L. R. A. (n. s.) 1235, 89 Pac. 915; affirmed, *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551, 29 Sup. Ct. Rep. 366; *Fogarty v. Southern Pacific Co.*, 121 Fed. 941; *Aetna Indemnity Co. v. Little Rock*, 89 Ark. 95, 115 S. W. 960; *Bacon v. Rives*, 106 U. S. 99, 104, 27 L. Ed. 69, 1 Sup. Ct. Rep. 3; *Yarde v. Baltimore & O. R. Co.*, 57 Fed. 913, 915.)

The evidence leaves entirely to conjecture or guess the following considerations upon which alone liability could be predicated, to-wit: (a) Where did the caving start? Was it in a completed section of the ditch or in the section where plaintiff was working, the risk of which ground conditions he assumed? (b) What started the caving? Was it something done by plaintiff himself? Was it something purely accidental, the risk of which he assumed? Was it something for which the defendant was liable? (c) If it started from some cause involving negligence of the defendant, was there any causal connection between such negligence and plaintiff's injury? The evidence does not tend to answer any of these questions, and the language of this court upon the former appeal is applicable. (See, also, *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Andree v. Anaconda Copper Min. Co.*, 47 Mont. 554, 133 Pac. 1090; *Wallace v. Chicago, M. & P. S. R. Co.*, 48 Mont. 427, 138 Pac. 499; *Howard v. Flathead Ind. Tel. Co.*, 49 Mont. 197, 141 Pac. 153.) At the close of the evidence the plaintiff was, therefore, in exactly the condition mentioned in *Gleason v. Missouri River Power Co.*, 46 Mont. 395, 128 Pac. 586, where it is said: "Unless the cause of this injury is attributable to the plaintiff's own act, then it was left entirely to conjecture and speculation and the verdict is but the result of the jury's guesswork, and upon such flimsy groundwork a judgment cannot rest."

*Mr. John H. Tolan* and *Mr. R. F. Gaines*, for Respondent, submitted a brief; *Mr. Gaines* argued the cause orally.

Commencing with the decision in the case of *Whitcomb v. Smithson*, 175 U. S. 635, 637, 44 L. Ed. 303, 20 Sup. Ct. Rep. 248, and continuing to date the supreme court of the United States has consistently and persistently limited the exception to the rule as to time of filing of petitions of removal cases such as *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. Rep. 264, wherein the circumstance which resulted in a separable controversy was a direct consequence of a voluntary act of plaintiff either in dismissing the action as to the other defendant or in amending his pleadings so as to show the existence of a separable controversy. In instances where a resident defendant has been removed from the action by the sustaining of a demurrer to the evidence, or the granting of a motion for nonsuit, or the granting of directed verdict and a dismissal of action by the supreme court of a state as to one defendant, there have been attempts to invoke this exception, but in all cases the supreme court of the United States has uniformly held that where the resident defendant is removed from the case by any act other than that of plaintiff, and plaintiff has insisted upon the liability of such defendant until a court or jury has said it did not exist, no right of removal exists. (*Whitcomb v. Smithson*, 175 U. S. 635, 637, 44 L. Ed. 303, 304, 20 Sup. Ct. Rep. 248; *Kansas City Sub. Belt R. Co. v. Herman*, 187 U. S. 63, 47 L. Ed. 76, 23 Sup. Ct. Rep. 24; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 4 Ann. Cas. 1147, 50 L. Ed. 441, 26 Sup. Ct. Rep. 161; *Lathrop, Shea & H. Co. v. Interior Const. etc. Co.*, 215 U. S. 246, 54 L. Ed. 177, 30 Sup. Ct. Rep. 76; *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, 33 Sup. Ct. Rep. 30.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On the second trial of this cause heretofore ordered by this court (48 Mont. 226, 136 Pac. 711), the plaintiff had a verdict

and judgment. The defendant has appealed from the judgment and an order denying it a new trial. The opinion delivered on the former appeal contains a statement of the issues involved and of the facts necessary to illustrate the question submitted on these appeals.

It appears from that statement that at the first trial the jury returned a verdict against the defendant corporation and in favor of its codefendant Hadalin. The judgment as to the latter was permitted to become final, and thus he was eliminated from the case. As soon as the *remittitur* from this court was filed in the district court, counsel for the defendant corporation applied for an order removing the cause to the United States court for the district of Montana. After argument the application was denied. Counsel for the defendant has made this ruling the subject of their first assignment of error.

We are unable to review the action of the court in denying [1] the petition. We have no doubt that it would have been reviewable on appeal from the judgment as an intermediate order, as was done in *Golden v. Northern Pacific Ry. Co.*, 39 Mont. 435, 18 Ann. Cas. 886, 34 L. R. A. (n. s.) 1154, 104 Pac. 549, if it had been properly brought into the record by bill of exceptions, along with the petition and bond. This was not done. Though a petition, bond and the order are incorporated in the transcript, they are not identified in any way. There is therefore no authenticated record before us to which we may look with safety to ascertain upon what the action of the court was based. (*Latimer v. Nelson*, 47 Mont. 545, 133 Pac. 680.) If it be assumed that the order is a part of the judgment-roll, the petition and bond are not. (Rev. Codes, sec. 6806.) The order on its face does not disclose the reason of the court's action. Whether the petition disclosed a case showing that the federal court had jurisdiction, or whether the bond was sufficient, we are unable to say. Beyond the statement in the order that "defendant's petition for the removal of this action, *etc.*, is denied," it does not appear that any petition was filed. But counsel say that the order denying the petition was made in

their absence, and insist that under the express provision of the statute it was deemed excepted to and became a part of the record without a bill of exceptions. (Rev. Codes, sec. 6784.) There is nothing in the record disclosing whether counsel were present or not. Even so, it was necessary to have the papers upon which the order was based authenticated in some way. This could be done only by bill of exceptions. (*Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609; *Latimer v. Nelson*, *supra*.)

The plaintiff's injury was caused by the caving of a ditch which he was engaged with others in excavating. On the former appeal it was pointed out that the evidence wholly failed to disclose whether the fall of earth by which plaintiff was injured was due to the negligence of the defendant corporation in failing to crib the completed portion of the ditch, or by the act of the plaintiff himself in the construction of that portion of it in which he was at work. It was held that, if the fall had been shown to be due to the failure of the defendant to crib the completed portion, the fall beginning in that portion and extending to the part where the plaintiff was at work thus causing the fall there, a case would have been made fixing liability upon the defendant; but that, inasmuch as the evidence did not show this, but left room for the inference that the cause of the fall was plaintiff's own carelessness during the course of his work, it failed to show a causal connection between the injury and defendant's negligence, even though it appeared that the fall extended to the completed portion of the ditch, and hence a case of liability was not made out. The plaintiff was the only eye-witness of [2] the accident, and, since he could not say at what point the fall started, two witnesses were called and permitted to say where, in their opinion, accepting as proven the facts detailed with reference to the observed difference in the character of the soil at the point where plaintiff was working, from that along the completed portion, the fall first began. Counsel for the defendant objected on the grounds that the subject was not one pertaining to an art, science or trade, and that the question put

to the witness incorporated a fact not disclosed by the evidence either directly or by fair inference.

The theory upon which expert testimony is held competent is that there are persons whose knowledge of a science, art or trade being superior to that of the mass of mankind, qualifies them to express an opinion upon any matter pertaining thereto. That the subject under inquiry here was such as to permit resort to expert evidence we have no doubt. One who has had experience in work such as that called for by the digging of ditches for gas and water pipe and excavating for buildings, from the necessity of the case has been required to note the character and consistency of the different kinds of earth under varying conditions. He must therefore be presumed to have special knowledge of the subject which the mass of mankind does not and cannot possess, whether his work is technically designated as a science, art or trade, or not. This brings the case within the rule of the statute, and, the witnesses having shown a special knowledge on the subject, it was competent to take their opinion. (*Copenhaver v. Northern Pacific Ry. Co.*, 42 Mont. 453, 113 Pac. 467; *State v. Keeland*, 39 Mont. 506, 104 Pac. 513.)

In putting a hypothetical question to a witness, counsel has [3] the right to assume as established, for the time being, all the facts in evidence tending, directly or by fair inference, to establish his theory of the case. (*State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.) He need not embody all the evidence on the subject to which it relates. If opposing counsel does not think the question incorporates all of the facts in evidence he can include them in questions propounded by himself. (*State v. Crowe*, 39 Mont. 174, 18 Ann. Cas. 643, 102 Pac. 579.) It is then for the jury to say whether the facts assumed by the question are really established and whether the opinion of the witness has any probative value.

It is insisted that the question embodied a fact which the evidence does not tend to show, viz., that the earth exposed in the walls of the ditch at the point where the plaintiff was working was different in texture and appearance from that at any other

point along the ditch. The only direct evidence introduced by the plaintiff on this point was that of the plaintiff himself and one Grantz. The evidence is not as satisfactory as it might have been, because it is not entirely clear that the observation of these witnesses was sufficient to enable them to describe it as it was. But in our opinion, in the light of all the circumstances in evidence, it presented a case for the jury. Counsel did not, therefore, transcend the rule by incorporating a favorable inference from it in their hypothetical question.

Counsel undertook to supply, by circumstantial evidence and the opinions of the experts referred to, the causal connection between the defendant's fault and the injury. We think they succeeded in making out a *prima facie* case. The finding of the jury thereon, confirmed by the action of the trial judge on the motion for a new trial, we must accept as conclusive.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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CANYON CREEK IRRIGATION DISTRICT, RESPONDENT, v.  
MARTIN, APPELLANT.

(No. 3,656.)

(Submitted March 31, 1916. Decided May 8, 1916.)

[159 Pac. 418.]

*Injunction—Corporations—Sale of Assets—Stockholder's Suit—  
Estoppel—Laches—Notice.*

Corporations—Injunction—Stockholder's Suit—Estoppel—Laches.

1. A stockholder in a reservoir company, a corporation organized for profit, with power to sell its assets upon a proper vote, who, upon a sale having been made, took no timely steps to assail its legality (Rev. Codes, secs. 3899, 3900), nor brought suit until after the lapse of five years, was estopped by his delay, under the sections *supra*, from ques-

tioning the proceedings leading to the sale, and barred by either section 6449 or section 6451, Revised Codes, from prosecuting the action.

[As to estoppel by acquiescence or silence, see notes in 57 Am. St. Rep. 429; 10 Am. St. Rep. 22.]

Same—Laches—Notice.

2. Until plaintiff irrigation district had notice of defendant's diversions of its impounded waters, it could not be charged with permitting him to do so, and hence with laches in failing to institute action against him.

*Appeal from District Court, Ravalli County, in the Fourth Judicial District; J. M. Clements, a Judge of the First District, presiding.*

ACTION by the Canyon Creek Irrigation District against Van D. Martin. From a judgment for plaintiff, the defendant appeals. Affirmed.

*Messrs. Wagner & Taylor*, for Appellant, submitted a brief; *Mr. J. D. Taylor*, argued the cause orally.

When a water right is once acquired, it attaches to the land as an appurtenance, and where, as in the instant case, a number of persons associated themselves together and formed a corporation for mutual benefit, the character of their holdings was not thereby changed so as to divest a nonconsenting stockholder of all his rights therein. (*Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318.) The only practical right resulting from membership in such a corporation is to have furnished to its members water for irrigation purposes, in proportion to the amount of stock held by them. (*Müller v. Imperial W. Co.*, 156 Cal. 27, 24 L. R. A. (n. s.) 372, 103 Pac. 227.) We think there can be no contention but that each share of stock of the Canyon Creek Reservoir Company represented a proportionate part of the water rights and the reservoir of the company. (See *Richey v. East Redlands Water Co.*, 141 Cal. 221, 74 Pac. 754.) The ownership of the property is in the stockholders. The rights of the company are limited to regulating and controlling the supply and supervising the works. (*Fuller v. Azua Irr. Co.*,



138 Cal. 204, 71 Pac. 98; *Rocky Ford Canal etc. Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. 638; *Wadsworth Ditch Co. v. Brown*, 39 Colo. 57, 88 Pac. 1060.)

*Mr. E. C. Kurtz* and *Mr. Geo. T. Baggs*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiff, a duly created irrigation district of the state of Montana, claiming ownership as against the defendant of certain reservoirs in Ravalli county, with the waters impounded thereby, and alleging that the defendant has interfered and is interfering with its property by diverting and using its said waters, brought this suit to enjoin him from continuing so to do. The answer as filed sought to present a general denial and an affirmative defense to this effect: That the Canyon Creek Reservoir Company, a corporation, acquired a site and thereon built a reservoir for the storage of water to irrigate the lands of its stockholders; that the reservoir so built is "the same reservoir mentioned in plaintiff's complaint"; that the defendant was and is a stockholder in said corporation, as also were certain other persons named in the answer; that said other persons on or about June 5, 1909, caused a meeting of the stockholders of said corporation to be held for the purpose of selling and disposing of all its assets, and at said meeting, by voting large amounts of the stock of said corporation theretofore unlawfully issued to them, or to some of them, and against the defendant's protest, adopted a resolution by the terms of which Miles Romney and William Tate became the purchasers of all the assets of said corporation; that Romney and Tate conveyed the same to the plaintiff herein; that said sale is void as against the defendant, and did not operate to divest him of his share, as represented by his stock in said company, in its reservoir and waters, which waters are necessary to the irrigation of his lands and have by use since become appurtenant to his lands. A reply was filed admitting, among other things, the sale to Rom-

ney and Tate of all the assets of said reservoir company and the purchase thereof by the plaintiff district from said Romney and Tate, but denying the allegations upon which the illegality of said transactions is sought to be based, and pleading affirmatively that litigation of the matters and things alleged by the defendant is barred by the provisions of sections 6449 and 6451, Revised Codes.

The case coming on for trial, the plaintiff moved "for judgment on the pleadings as to the affirmative defenses contained in the defendant's answer," which motion was by the court sustained. Thereupon evidence was introduced tending to show that the defendant had interfered, and was interfering, as alleged, with the water supplied by plaintiff's reservoirs, including the reservoir which had originally been constructed by the reservoir company, but which in 1909 or 1910 had been reconstructed and made more serviceable by the plaintiff. It also conceded that the defendant owned certain shares of stock in the reservoir company and that he protested against the sale of its assets. For himself the defendant testified, suggesting that one or two of the members of the plaintiff district had consented to his using the water after the plaintiff's commissioner, by whom he had been forbidden so to do, had left, and he offered, but was not allowed, to support his right, independently of such consent, by offering in evidence the articles of incorporation of the reservoir company and certain of its by-laws. The effect of these by-laws is to limit the right to hold stock in the company to persons owning lands irrigable by its waters, and to such persons only in proportion to the irrigable acreage held by them respectively. At the close of all the evidence the court ordered a perpetual injunction to issue as prayed, and, a decree being entered accordingly, this appeal therefrom was taken.

The argument for reversal is this: That the offered evidence shows the reservoir company to have been an organization mutual in character, whose functions were merely those of a carrier of water to its own members exclusively, such members being in law tenants in common of the reservoir, waters and

ditches nominally held by the company; that the defendant's interest in said property was in the nature of an easement appurtenant to his lands, and of it he could not be divested by any sale of the company's assets made without his consent; that he could not be barred by either of the sections pleaded in the reply, because the plaintiff had since its organization and alleged purchase of the reservoir company's assets in 1909 permitted the defendant to divert such water, and "so long as his asserted rights were not molested, he had no occasion to institute an action against the district to enforce his rights in the reservoir"; and finally, that the plaintiff itself is estopped by laches to assert any claims hostile to the defendant.

There is no merit in any of this. Whether, if the reservoir [1] company were a mutual concern with functions only of carriage, the effect of membership in it would be as supposed by the defendant, we are not called upon to say, because the articles of incorporation of the reservoir company negative any such notion of its character. They show that it has a capital stock, commercially valued, and they say: "The purposes and objects for which said company is formed are: To supply water to the public; to construct canals, ditches, flumes and other works for conveying water and reservoirs for storing same; to dig ditches, build flumes and run tunnels; to purchase, hold, develop, improve, use, lease, sell, convey or otherwise dispose of water and water powers and right and the sites thereof and lands necessary or useful therefor, for the industries and habitations arising or growing up or to arise or grow up in connection with or about the same; to carry on any branch of business designated to aid in the industrial and productive interests of the country and the developments thereof, or of one or more of the branches of business herein mentioned in connection with and as a part of the purposes and objects above mentioned for which this company is formed to purchase, develop, acquire, buy by appropriation or otherwise, hold, lease, mortgage, sell and convey water, water rights, water privileges, rights of way, pipes, flumes and all similar property; to construct and operate

ditches, dams, flumes, canals, reservoirs and other means of collecting and utilizing water for irrigation, power, transmission of power, transportation and other useful or beneficial purposes; to sell, lease, give and supply water for domestic, mechanical, agricultural, irrigation, power and other purposes." This fixes and determines the character of the reservoir company; in it there is nothing suggestive of mutuality, nothing to indicate that the functions of the corporation are confined to the carriage of water to its members so as to make them, and not the corporation, the owners of its ostensible assets. If it be supposed, however, that this is made to appear from the by-laws offered but not received in evidence, the answer is that not in this way can the essential nature of a corporation be affected. The reservoir company in which the defendant held or holds shares of stock was an ordinary corporation for profit, with a scope almost as wide as language can make it, with ownership of and title to its assets, and with power to sell them all upon a proper vote of its stockholders. (Rev. Codes, secs. 3897-3900.) It made such sale, and if as a preliminary in so doing, frauds, misfeasance or violations of such of its by-laws as were legal occurred, and these acts constituted an invasion of defendant's right as a stockholder, he could have effectually assailed them if he had acted in time and in a proper proceeding. According to his own pleading, however, he has delayed too long (Rev. Codes, secs. 3899, 3900, 6449, 6451), and the transfer must be considered, as against him, entirely valid and efficient.

It results, then, that by the resolution of June 5, 1909, the reservoir company became divested of the reservoir with its site and with any waters impounded or to be impounded thereby, and thereafter the plaintiff district became the owner.

There is nothing in either pleading or proof to suggest that [2] during any of the period intervening between that time and August, 1914, the plaintiff's diversions of the waters, if they occurred, were such as to challenge its notice. It therefore cannot be charged with laches, for, to paraphrase the language of the defendant himself, until injury occurred it had no

occasion to institute an action against him to enforce its right in the reservoir or in the waters in question.

The decree appealed from is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied June 29, 1916.

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WALLACE, RESPONDENT, v. CHICAGO, MILWAUKEE & PUGET SOUND RY. CO. ET AL., APPELLANTS.

(No. 3,624.)

(Submitted February 18, 1916. Decided May 8, 1916.)

[157 Pac. 955.]

*Personal Injuries—Master and Servant—Rules of Master—Instructions—Appeal and Error—Law of the Case.*

*Appeal and Error—Law of the Case.*

1. Where a second trial is had upon the same pleadings and substantially the same evidence as upon the first, the decision on the first appeal is the law of the case on the second.

*Personal Injuries—Evidence—Immateriality.*

2. Where on a former appeal in a personal injury action it was held that the failure of defendant company to provide a safe place in which or safe appliances with which to work could not have caused, or contributed to, plaintiff's injury, offered evidence that plaintiff never made any complaint as to the dangerous character of his work was immaterial, and its rejection not error.

*Same—Rules of Employer—Matter of Defense.*

3. A trade union rule offered in evidence by defendant company, relative to who should direct machinists or assume responsibility for other men's work, which had not been shown to have been adopted by it, was properly rejected.

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Generally on the question of vice-principalship as determined with reference to character of act causing injury, see note in 54 L. R. A. 37; and as to statutory liability for negligence of employees exercising superintendence, see note in 58 L. R. A. 33. And for cases passing on the question, for what acts of superior servant is master liable, see note in 51 L. R. A. 548.

As to conclusiveness of prior decisions on subsequent appeals, see note in 34 L. R. A. 321.

Same—Duty of Servant to Obey—Violation of Rule—Effect.

4. Plaintiff having been directed by defendant's foreman to obey the orders of a fellow-workman, it was his duty to obey, even though contrary to a rule adopted by the company, the violation of the rule thereupon not constituting a defense in an action by plaintiff for consequent injuries.

[As to warnings and instructions to servants engaged in dangerous work, see notes in 1 Am. St. Rep. 28; 1 Am. St. Rep. 548.]

Same—Liability of Employer—Instructions.

5. An instruction in the exact language of section 5244, Revised Codes, declaring that the employer must in all cases indemnify the employee for losses caused by the former's negligence, was properly given.

Same—Impairment of Earning Capacity—Instructions.

6. In the absence of a request for a more specific instruction on the plan to be adopted in determining the damages suffered by plaintiff for impaired earning capacity, one in substance the same as that reviewed in *Bourke v. Butte etc. P. Co.*, 33 Mont. 267, was proper.

*Appeal from District Court, Custer County; C. C. Hurley, Judge.*

ACTION by William Wallace against the Chicago, Milwaukee & Puget Sound Railway Company and Joseph Feeley. Judgment for plaintiff, and defendants appeal from it and an order denying them a new trial. Affirmed.

*Mr. Geo. W. Farr, Messrs. H. H. Field and C. S. Jefferson* of the Bar of Chicago, Illinois, of Counsel, submitted a brief in behalf of Appellant; *Mr. Farr* argued the cause orally.

Was Feeley a fellow-servant or a vice-principal? Under the rule recognized by this court, the question of whether an employee is a vice-principal or a mere fellow-servant is to be determined, not by the grade of service assigned to him, but by the character of his service. (*Gregory v. Chicago, M. & St. P. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123; *Verlinda v. Stone & Webster Engineering Corp.*, 44 Mont. 223, 119 Pac. 573; *Kinsel v. North Butte Min. Co.*, 44 Mont. 445, 120 Pac. 797; *McAllister v. Rocky Fork Coal Co.*, 45 Mont. 433, 123 Pac. 696; *Vasby v. United States Gypsum Co.*, 46 Mont. 411, 128 Pac. 606.) Where the injury results from dangers caused in the progress of the work, and from the negligent use of safe appliances by fellow-servants, or from the failure to give warning to a servant of

the dangers as they arise from time to time, it belongs to the details of the work, and the master is not liable, since the offending servant is a fellow-servant with a fellow-servant, on the theory that his negligence relates merely to the details of the work. (*Indianapolis Traction & T. Co. v. Mathews*, 177 Ind. 88, 97 N. E. 320; *Burch v. Louisville etc. Ry. Supply Co.*, 146 Ky. 272, 142 S. W. 414; *Goulding v. Eastern Bridge & S. Co.*, 210 Mass. 52, 96 N. E. 71.) A master is deemed to have performed his whole duty where he has supplied an instrumentality which is reasonably safe if it is carefully used by the fellow-servants of the injured person; or, in other words, where an appliance is reasonably safe to operate and the operation necessarily rests upon the care, intelligence and fidelity of fellow-servants of the person injured, the master will not be held responsible for an accident, the nature of which indicates that it must have been due to the manner in which the appliances were operated by one of these workmen. (*Fowler v. Chicago & N. W. Ry. Co.*, 61 Wis. 159, 21 N. W. 40; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Dana v. Crown Point Iron Co.*, 51 N. Y. St. Rep. 238, 22 N. Y. Supp. 455; *Portland Gold Mining Co. v. Duke*, 164 Fed. 180, 90 C. C. A. 166.) That the foreman has the power to, and did, direct the progress of the work, and order another servant to do a particular thing, in which he was hurt, does not make him a vice-principal. (*Gittens v. William Porten Co.*, 90 Minn. 512, 97 N. W. 378; see, also, *Gonsior v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 385, 31 N. W. 515; *McBride v. Union Pac. Ry. Co.*, 3 Wyo. 247, 21 Pac. 687; *Linderman v. Tennessee Coal, I. & R. Co.*, 177 Ala. 378, 58 South. 900; *Gun v. Willingham*, 111 Ga. 427, 36 S. E. 804; *Summersell v. Fish*, 117 Mass. 312; *Duffy v. Upton*, 113 Mass. 544; *Andre v. Winslow Bros. Elevator Co.*, 117 Mich. 560, 76 N. W. 86.)

The respondent was guilty of such contributory negligence as barred his recovery. By assuming the position he did assume and knowing and appreciating the conditions, the weight of the wheels, the dangers incident to their movements, the plaintiff was guilty of contributory negligence. (*Vicksburg Mfg. Co. v.*

*Vaughn* (Miss.), 27 South. 599; *Simmons v. Chicago & T. R. Co.*, 110 Ill. 340; *Brooks v. W. T. Joyce*, 127 Iowa, 266, 103 N. W. 91; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 109 Am. St. Rep. 917, 1 L. R. A. (n. s.) 283, 81 Pac. 1089; *Kirkpatrick v. St. Louis & S. F. R. Co.*, 159 Fed. 855, 87 C. C. A. 35; *Schmeizer v. Central Furniture Co.*, 134 Mo. App. 493, 114 S. W. 1043.)

*Messrs. Loud, Collins, Campbell, Wood & Leavitt*, for Respondent, submitted a brief; *Mr. Chas. S. Loud* argued the cause orally.

The person on whom is conferred the authority and power to direct work for the safety of servants engaged therein is acting as the master, or, as it is said, is his *alter ego*, and the master is liable for the negligence of the agent he has selected to do his (the master's) particular work. The liability does not depend upon the doctrine of *respondeat superior*, but upon the omission of some duty of the master which he has confided to such inferior employee. (*Flike v. Boston etc. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Hankins v. New York etc. R. Co.*, 142 N. Y. 416, 40 Am. St. Rep. 616, 25 L. R. A. 396, 37 N. E. 466.)

It is our contention that Mr. Feeley on the day in question was in the performance of a nondelegable duty of the master, to-wit, the duty of superintendence and supervision of the work in which appellant was engaged at the time he received the injuries complained of, and that he was the vice-principal of the railway company in the giving of orders, one of which was a proximate cause of appellant's injuries. (See *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369; *Jackson v. Danaher Lumber Co.*, 53 Wash. 596, 102 Pac. 416; *Armstrong v. Oregon Short Line etc. R. Co.*, 8 Utah, 420, 32 Pac. 693; *Louisville & N. R. Co. v. Crady*, 24 Ky. Law Rep. 2339, 73 S. W. 1126.)



The supreme court of California has held that between the assistant foreman and a boy subject to his orders, the relation of fellow-servant does not exist so as to relieve the employer from liability for injuries received by the boy, having obeyed the orders of such foreman. (*Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Mullin v. California Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535.) In *Cleveland, C. & C. Ry. Co. v. Keary*, 3 Ohio St. 201, the court, in its opinion, in discussing this question, said: "No service is common that does not admit of a common participation, and no servants are fellow-servants when one is placed in control over the other." The facts of the case at bar are much stronger than are those presented in the case of *Dowling v. Allen*, 74 Mo. 13, 41 Am. Rep. 298, but they are so similar in some of the essential particulars that we desire to call the court's attention particularly to this case.

This question is a question of fact for the jury. (*Patnode v. Warren Cotton Mills*, 157 Mass. 283, 34 Am. St. Rep. 275, 32 N. E. 161; *Hess v. Adamant Mfg. Co.*, 66 Minn. 79, 68 N. W. 774; *Perras v. A. Booth & Co.*, 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; *Johnson v. Minneapolis Gen. Electric Co.*, 67 Minn. 141, 69 N. W. 713.)

Contributory negligence should be pleaded with the same degree of particularity as is required of plaintiff in pleading negligence. (*Gleason v. Missouri River Power Co.*, 42 Mont. 238, 112 Pac. 394.) It is nowhere alleged in defendant's answer that there was a safe and unsafe method of doing this work, or that the plaintiff chose the unsafe method, so that no issue was presented by the pleadings. The burden of proof is upon the defendant to establish this defense, so that it devolved upon it, in this case, to show, if it could, that there was some other method which was safer than the one employed for the doing of the work. We might say, further, that we understand the rule to be that, "One in the performance of work under the sanction of his employer is not at fault if the manner resorted to in doing the work is similar to that frequently followed by other

workmen." (*Broadfoot v. Shreveport Cotton Oil Co.*, 111 La. 467, 35 South. 643; *Coates v. Soley*, 194 Mass. 386, 80 N. E. 464.)

HONORABLE R. LEE WORD, a Judge of the First Judicial District, sitting in place of MR. JUSTICE SANNER, disqualified, delivered the opinion of the court.

On a former appeal in this cause (48 Mont. 427, 138 Pac. 499) this court affirmed the order granting a new trial. The following passage from the former opinion forms a pertinent introduction to a consideration of the questions presented on this appeal: "It appears that the plaintiff and other laborers were members of a wheel-press gang at defendant company's shop in Miles City, and on April 4, 1912, were engaged in moving the drive-wheels of a locomotive from a track to a lathe, some thirty feet distant, for the purpose of truing up the wheels; that the wheels were very heavy, and it was necessary to block them in order to hold them stationary; that for this purpose they used short wooden blocks about two inches by six or eight inches, placed in front of and behind the wheels; that this blocking was required on account of the block or iron cast between two or four of the spokes of each wheel, called a counterpoise or balance; and that defendant Feeley was in charge of the lathe. The testimony is conflicting as to whether or not the work of moving the wheels by the wheel-press gang on the occasion referred to was under the direction and supervision of defendant Feeley."

After a careful examination of the evidence and the law applicable thereto, this court came to the conclusion that the only ground of negligence that found support in the evidence was the careless and negligent removal of the block of wood from its position in front of the wheel. It was further held that under the evidence the question whether the defendant Feeley was a fellow-servant of the plaintiff or was a vice-principal of the defendant company should have been submitted to the jury under proper instructions.

On the second trial the question of the negligence of the company in removing the wooden block from its position in front of the wheel and the question whether at the time of the injury the defendant was a vice-principal of the company, and not the fellow-servant of plaintiff, were submitted to the jury. By their verdict the jury, in effect, found that the company was negligent in removing the wooden block from the front of the wheel; that this negligence was the proximate cause of the plaintiff's injuries; and that the defendant Feeley was a vice-principal of the defendant company. The appeals are from the judgment and from an order denying a new trial.

The second trial was upon the same pleadings. The evidence [1] was, in substance, the same as upon the first. The decision upon the former appeal is the law of the case upon this. Numerous errors, both in the admission and in the exclusion of evidence, and in instructions given and refused, are assigned by appellants. All have been carefully considered. Some will be particularly noticed herein. None are prejudicial.

Assignments Nos. 2 and 3 relate to the refusal of the court to permit appellants to show, upon the cross-examination of the [2] witness B. H. Smith, that the plaintiff had never made any complaint as to the dangerous character of the work. As this court held upon the former appeal that a failure of the company to provide a safe place to work or safe appliances with which to do the work, if any such failure existed, did not or could not have caused or contributed to plaintiff's injury, the offered evidence was immaterial. At best it was a matter of defense, and one which appellants could not properly introduce upon the cross-examination of plaintiff's witness.

Nor did the court err in refusing to admit in evidence rule [3] No. 18, which is as follows: "Men in charge of machinists' work shall themselves be machinists. Men not bearing the title of foreman, with pay accordingly, shall not direct other men, or assume the responsibility of other men's work." Three of the assignments of error as to the exclusion of the offered rule arose upon cross-examination of plaintiff's witness, B. H. Smith.

The principal defense was that plaintiff had assumed the risk incident to any neglect or failure to act on the part of the employees of defendant company who were alleged to have been the fellow-servants of the plaintiff. Upon his direct examination the witness Smith had only testified to certain specific directions that he had given to Feeley and the wheel-press gang, of which plaintiff was a member. Under this state of facts the appellants were not entitled to introduce in evidence, on cross-examination, the rule in question, which, if admissible at all, was a matter of defense. The witness Smith did not come within the prohibition of the rule, because he, as machine foreman, had charge of the men and machines in the machine-shop. The rule was a trade union rule, and, so far as the record shows, was never adopted by the railway company. But, even if the [4] rule had been in force as a rule of the company, it would not constitute a defense to this action, in view of the fact that the plaintiff had been directed by the witness Smith, the representative of the master, to obey the orders of the defendant Feeley. (*Mason v. Richmond & D. R. Co.*, 111 N. C. 482, 32 Am. St. Rep. 814, 18 L. R. A. 845, 16 S. E. 698.)

Error is predicated upon instructions 4, 17, 18, 19, 20 and 24 as given. While the giving of these instructions was not prejudicial, we note some of the objections urged: Instruction No. 17 [5] is in the exact language of section 5244 of the Revised Codes, and was properly given under *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.

Under the law of this case as declared by this court on the former appeal, instructions Nos. 18, 19 and 20, which submitted to the jury the question of the negligence of the company in removing the block from its position in front of the wheel, and the question whether or not Feeley was a vice-principal, were proper.

Instruction No. 24, the giving of which is urged as error, is [6] the substance of the holding of this court in *Bourke v. Butte etc. Power Co.*, 33 Mont. 267, 289, 83 Pac. 470. If the defendants had desired a more specific instruction in reference

to the plan or standard to be adopted in determining the damages for impaired earning capacity, they should have asked for it. (*Bourke v. Butte etc. Power Co., supra.*)

Nor do we find that the court committed error in refusing the instructions requested by defendants. In the main, they were covered by those given. The others were incorrect in point of law or inapplicable to the issues as this court declared them to be on the first appeal.

We find no prejudicial error in the record.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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CITY OF LEWISTOWN, APPELLANT, v. WARR, RESPONDENT.

(No. 3,650.)

(Submitted March 30, 1916. Decided May 8, 1916.)

[157 Pac. 954.]

*Cities and Towns—Improvement Districts—Faulty Description—Effect.*

Special Improvement Districts—Faulty Description—Effect.

1. By a resolution to create a special improvement district described as being bounded by certain lots, such lots were not incorporated in, but excluded from, the proposed district.

Same—Assessment—Description of District—Definiteness.

2. Proceedings for the imposition of a special improvement tax are *in invitum*, and before property can be held subject to the burden, it must be described with sufficient certainty that the owner cannot be misled; it being the intention of the statute that the resolution of intention shall contain a description of the proposed district by a line which marks its exterior boundaries.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by the City of Lewistown against A. W. Warr. Demurrer to complaint sustained and judgment of dismissal entered. Plaintiff appeals. Affirmed.

*Mr. I. B. Kirkland*, for Appellant, submitted a brief.

*Mr. O. W. Belden*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1909 a petition was presented to the city council of Lewistown for the creation of a special improvement district. A resolution of intention was adopted by the council which, among other things, provided: "Said special improvement boulevarding district hereby intended to be created is bounded as follows: On the northeast by lot 7 in block 11, lots 6 and 7 in block 15, and lots 6 and 7 in block 18 of Stafford Addition; on the northwest by lot 7 in block 11 and the southeast half of block 10 of Stafford Addition and the southeast corner of a certain piece or parcel of ground abutting on Eighth Avenue opposite lot 7 in block 10 of said Stafford Addition; on the southwest, by a certain piece or parcel of ground abutting on Eighth Avenue opposite lot 7 in block 10 of Stafford Addition and a certain piece or parcel of ground abutting on Eighth Avenue opposite block 16 of Stafford Addition and lying between Broadway Street and Main Street, and all that portion of that piece or parcel of ground abutting on Main Street, directly opposite to block 1 of Stafford Addition No. 1 and the northwest half and lots 1 and 12 of block 1 of Stafford Addition No. 1; on the southeast by the intersection of Janeaux Street with Seventh and Eighth Avenues, all in the city of Lewistown, Fergus County, Montana." Subsequently such proceedings were had that a tax payable in five annual installments was levied to defray the expense of the improvement. A. W. Warr, the owner of a portion of that parcel designated in the resolution of intention, as — the block 16 of Stafford Addition, and block 1 of Stafford

Addition No. 1, failed or refused to pay the assessment sought to be levied against his property, and the city brought this action to enforce payment. The complaint by reference makes the resolution of intention a part of it. A general demurrer to the complaint was sustained, and the city, electing to stand on its pleading, suffered a judgment of dismissal to be entered against it and appealed.

But a single question is presented: Is defendant's property [1] included within the boundaries of the special improvement district as described in the resolution of intention? Or, in other words, does the district include the parcels of land by which it is bounded? For instance, the resolution recites that the district is bounded "on the northeast by lot 7 in block 11, lots 6 and 7 in block 15, and lots 6 and 7 in block 18 of Stafford Addition."

Does the resolution by that description incorporate those five lots into and make them a part of the district? To ask the question is to answer it. If the city really intended to include any of these parcels of ground in the proposed district, it could not have employed more apt language to defeat its own purpose. But even if the city's intention were manifest, that alone would not suffice. All proceedings which have for their ultimate object [2] the subjection of property to the imposition of a tax are *in invitum*, and before property can be held subject to the burden, it must be described with sufficient certainty that the owner cannot be misled. (37 Cyc. 1051.) The statute clearly contemplates that the resolution of intention shall contain the description of the district by a line which marks its exterior boundaries.

The resolution in question excludes defendant's property from the special improvement district, and the city cannot collect the tax which was sought to be imposed.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CITY OF LEWISTOWN, APPELLANT, v. WARREN,  
RESPONDENT.

(No. 3,652.)

(Submitted March 30, 1916. Decided May 8, 1916.)

[157 Pac. 954.]

*Cities and Towns—Special Improvement Districts—Estoppel—  
Payment of Installment of Tax—Prejudice.*

*Special Improvement Districts—Creation—Estoppel by Joining in Petition.*

1. Where an owner joined in a petition for the creation of a special improvement district, and thereafter in creating it a large part of the property described therein was excluded by the city council, the petitioner was not estopped to subsequently attack the validity of its creation by the fact that he joined in the petition.

*Same—Estoppel—Payment of Installment of Tax.*

2. To estop a taxpayer from attacking the validity of the creation of a special improvement district by payment of an installment of the tax, the payment must have been voluntarily made.

[As to taxpayers' actions, see note in Ann. Cas. 1913C, 898.]

*Same—Estoppel—Payment of Installment of Tax—Prejudice.*

3. Defendant city could not have been prejudiced by the payment of an installment of a special improvement tax, which, being invalid, it was not entitled to collect, and was therefore not in position to claim an estoppel.

*Appeal from District Court, Fergus County; Roy E. Ayers,  
Judge.*

ACTION by the City of Lewistown against Jennie W. Warren.  
Judgment for defendant and plaintiff appeals. **Affirmed.**

Cause submitted on briefs of Counsel.

*Mr. I. B. Kirkland*, for Appellant.

*Mr. O. W. Belden*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts in this case are substantially the same as in cause No. 3650, *City of Lewistown v. Warr*, ante, p. 353, 157 Pac.

The defendant owns lot 7 in block 15 of Stafford Ad-



dition, and her property is excluded from the proposed improvement district by the description contained in the resolution of intention.

But counsel for the city insists that defendant is estopped to contest the legality of the city's proceedings because: (a) She petitioned for the creation of the district; and (b) she paid the first installment of the tax without protest.

(a) By reference the petition is made a part of the complaint. [1] It discloses that this defendant did join in the petition for the creation of a special improvement district to include all of the property mentioned in the petition. In creating the district, however, the city excluded a very considerable portion of the property, and cannot now be heard to say that the defendant should be estopped by her conduct. She may have been desirous that a district be created with a large area and a correspondingly low tax, and justly opposed to the creation of a district with a less area and a higher tax. (2 Page & Jones on Taxation by Assessment, sec. 1013.)

(b) The complaint does not allege that defendant paid the [2] first installment, though that might be inferred from the allegation that she did not pay the second or third installment; but even if such an inference might be drawn, the complaint is barren of any suggestion that such payment was made voluntarily. [3] However, the city could not be misled to its prejudice by the payment to it of one installment of a tax to which it was not entitled, and there is therefore no element of estoppel presented upon this phase of the case.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## CITY OF LEWISTOWN, APPELLANT, v. WARR, RESPONDENT.

(No. 3,651.)

(Submitted March 30, 1916. Decided May 2, 1916.)

[157 Pac. 954.]

(For syllabus, see *City of Lewistown v. Warr*, ante, p. 353.)*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by City of Lewistown against Helen Warr. Judgment for defendant and plaintiff appeals. **Affirmed.**

*Mr. I. B. Kirkland*, for Appellant.

*Mr. O. W. Belden*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts in this case are identical with those in cause No. 3650 (*ante*, p. 353, 157 Pac. 953), and upon the authority of that case the judgment herein is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

FIRST NATIONAL BANK OF MILES CITY, APPELLANT, v.  
BARRETT, RESPONDENT.

(No. 3,647.)

(Submitted March 29, 1916. Decided May 8, 1916.)

[157 Pac. 951.]

*Negotiable Instruments—What Constitutes—Defenses—Want of  
Consideration—Erroneous Instruction.*

**Negotiable Instruments—What Constitutes.**

1. To constitute an instrument a negotiable one, it must, under section 6032, Revised Codes, be in writing, signed by the maker, contain an unconditional promise to pay a sum certain in money, and be payable, on demand or at a fixed or determinable future time, to order or bearer.

[As to what is negotiable instrument, see notes in 14 Am. Dec. 421; Ann. Cas. 1912D, 4.]

**Same—Negotiability not Destroyed, by What.**

2. The negotiable character of a promissory note which met the requirements of the statute enumerated above was not affected by recitals therein contained: That the makers had purchased a stallion from the payee; that the indebtedness should bear interest at a fixed rate, payable semi-annually; that upon default of an interest installment, the principal sum with interest should become due; that the makers should pay an attorney fee in case collection had to be enforced, coupled with an order authorizing delivery of the animal to any one of the makers.

**Same—Defenses Available.**

3. The defenses of want of title in plaintiff and forgery of defendant's signature are available whether the instrument sued on be negotiable or non-negotiable.

**Same—Want of Consideration—When not Defense.**

4. In an action by an indorsee before maturity to enforce collection of a negotiable promissory note, an instruction that if there was not any consideration for the instrument as between the maker and the payee, verdict must be for defendant, was erroneous.

*Appeal from District Court, Beaverhead County; W. A. Clark, Judge.*

ACTION by the First National Bank of Miles City against M. Barrett. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed and remanded.

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As to effect of provisions accelerating maturity, as affecting negotiability of note, see note on the different phases of the question in 35 L. E. A. (n. s.) 390; L. E. A. 1915B, 472.

For authorities passing on the question of provisions for attorney's fees as affecting negotiability of note, see note in L. E. A. 1915B, 675.

*Messrs. Loud, Collins, Campbell, Wood & Leavitt and Mr. H. B. Duff*, for Appellant, submitted a brief; *Mr. C. H. Loud* argued the cause orally.

A note which contains a statement of the particular transaction giving rise to the instrument is not thereby rendered non-negotiable. (*Selover on Negotiable Instruments*, 2d ed., 50; *Newton Wagon Co. v. Diers*, 10 Neb. 284, 4 N. W. 995; *Doherty v. Perry*, 38 Ind. 15; *Bank of Sherman v. Apperson*, 4 Fed. 25; *First National Bank v. Michael*, 96 N. C. 53, 1 S. E. 855.)

"Thus a promise to pay a stated sum for the privilege of placing advertising signs in street-cars is negotiable, and a statement that the note was given for insurance, or for personal property or for rent, does not destroy its negotiability." (*Id.*; *Siegel v. Chicago Trust etc. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 7 L. R. A. 537, 23 N. E. 417; *American Ins. Co. v. Gallahan*, 75 Ind. 168; *Kirk v. Dodge County Mut. Ins. Co.*, 39 Wis. 138, 20 Am. Rep. 39; *Union Ins. Co. v. Greenleaf*, 64 Me. 123; *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661; *Collins v. Bradbury*, 64 Me. 37; *Buchanan v. Wren*, 10 Tex. Civ. 560, 30 S. W. 1077.)

Fraud in the contract, or in the consideration out of which the note arose, is no defense in favor of the maker against the *bona fide* holder thereof. (*Culver v. Hide & Leather Bank*, 78 Ill. 625; *Wood v. Waters*, 1 Litt. (Ky.) 176, 13 Am. Dec. 228; *Farrell v. Lovett*, 68 Me. 326, 28 Am. Rep. 59; *Ross v. Webster*, 63 Conn. 64, 68, 26 Atl. 476; *Barney v. Earle*, 13 Ala. 106; *King v. Doane*, 139 U. S. 166, 35 L. Ed. 84, 11 Sup. Ct. Rep. 465; *Middletown Bank v. Jerome*, 18 Conn. 443; *Strough v. Gear*, 48 Ind. 100.)

If the maker, or other party bound by the original consideration of negotiable paper, proves that there was fraud in the inception of the instrument, or circumstances raising a strong suspicion of fraud, the general presumption in favor of the holder is then overcome, and he is bound to show that he acquired the paper *bona fide*, for value, before maturity, and in the usual

course of business, and under circumstances creating no presumption that he knew of the fraud. (*Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307, 20 Pac. 129; *Carrier v. Cameron*, 31 Mich. 373, 18 Am. Rep. 192; *Hamilton v. Marks*, 63 Mo. 167.)

*Messrs. Norris, Hurd & Smith*, for Respondent, submitted a brief; *Mr. Edwin L. Norris*, argued the cause orally.

The lower court held that the stockholders' purchasing contract in issue here was a non-negotiable instrument, and that any defense thereto which might have been made against C. W. Green, the original payee named therein, might be made as against the plaintiff and appellant herein. This holding is supported by the provisions of section 5853, Revised Codes, and the case of *State v. Mitton*, 37 Mont. 366, 375, 127 Am. St. Rep. 732, 96 Pac. 926.

Whether the bank was a beneficial holder of the note or held the same for collection purposes was a disputed and material fact in the case, and a fact which the jury had the right to, and doubtless did, pass upon in rendering its verdict.

The jury having in its verdict found all the issues in favor of respondent, it must be presumed that it found that the appellant was not the beneficial owner of said instrument, and held the same merely for collection purposes.

If the bank was not the beneficial holder of said note and held the same merely for collection purposes, then any defense that might have been offered by the respondent against C. W. Green, the payee named in said instrument, could with like effect be offered against the appellant. (*Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393; *Smith v. Bayer*, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497; *Prescott v. Leonard*, 32 Kan. 142, 4 Pac. 172; *Saulsbury v. Corwin*, 40 Mo. App. 373; *Johnston v. Schnabaum*, 86 Ark. 82, 126 Am. St. Rep. 1082, 15 Ann. Cas. 876, 17 L. R. A. (n. s.) 838, 109 S. W. 1163; *Schneider v. Johnson*, 161 Mo. App. 375, 143 S. W. 78; *Wilson v. Tolson*, 79 Ga. 137, 3 S. E. 900; *Holcomb v. Sayers*, 173 Mich. 238, 138 N. W. 1043.)

Regardless of whether or not the stockholders' purchasing contract was a forgery, there can be no question but that the same was obtained by or originated in fraud, and under such conditions it is necessary for the appellant to show that it was the holder in due course as defined by statute, and this the appellant failed to do. No witness for appellant anywhere states that the bank took the note in good faith and for value, or that the bank had no notice of the infirmity in the instrument or defect in the title of Mr. Ingham or Mr. Green thereto. The appellant by failing to bring itself within the purview of the definition of a holder in due course may not now insist that it was such holder, or that it may be exempt from the fraud practiced by Green, the original payee and holder of the note, upon respondent and the persons whose names are purported to be attached to said instrument.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover upon an instrument in writing which it is alleged was transferred to plaintiff by indorsement before maturity. The writing, without the indorsement, follows:

**"Stockholders' Purchasing Contract.**

**"Nov. 15th, 1910.**

"After a good and satisfactory examination of the Percheron stallion named Bobino No. 33674 owned by C. W. Green, of Miles City, Mont., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said stallion of C. W. Green accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

**"\$3,600.00.**

**Miles City, Mont., Nov. 15th, 1910.**

"For value received, I promise to pay to the order of C. W. Green, the sum of thirty-six hundred dollars, payable at the

First National Bank of Miles City, Montana, in payments as follows:

Thirty-Six Hundred Dollars, Nov. 15th, 1911.

..... 191-.

..... 191-.

with interest from date at the rate of 8 per cent., payable semi-annually, and, if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and, in case suit or action is instituted to collect payment, I agree to pay reasonable attorney fees.

"M. BARRETT.

"JAMES F. BLAIR.

"W. G. BLAIR.

"NAY & JACOBS.

"JAMES MANSFIELD.

"JOHN THOMA.

"FRANK ESTERWOLD.

"M. K. DAVISON.

"JAMES ELMOSE Co.

"J. R. SCOTT."

The answer consists of a general denial of all the allegations in the complaint, a specific denial that there was ever any consideration for the instrument, and the further denial that the defendant ever executed it. The answer alleges affirmatively that, if defendant's signature is affixed to the writing, it was obtained by fraud. The reply denies all new matters.

Upon the trial the court adopted the theory of the defendant that the instrument is non-negotiable in character, and that any defenses available as against the original payee were equally available as against the plaintiff, and instructed the jury accordingly. In answer to a special interrogatory the jury found that there was not any consideration for the writing. A general verdict in favor of the defendant was returned, and from the judgment entered thereon and from an order denying a new trial, the plaintiff appealed.

Appellant insists that the instrument in question is a negotiable promissory note, and that the court erred in the theory adopted for the trial of the case. Our Negotiable Instruments Act (Rev. Codes, secs. 5842-6037) defines a negotiable promissory note as follows: "A negotiable promissory note within the meaning of this Act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him." (Sec. 6032.) The essential elements are: (1) It must be in writing; (2) it must be signed by the maker; (3) it must contain an unconditional promise to pay a sum certain in money; (4) it must be payable to order or to bearer; (5) it must be payable on demand or at a fixed or determinable future time. These are the tests prescribed by statute to which every instrument must be subjected in order to maintain the character and enjoy the privileges of a negotiable promissory note.

To what extent does the instrument in question meet these [2] statutory requirements? (1) It is in writing. (2) It is signed by the makers. (3) It contains an unconditional promise to pay a sum certain in money, to-wit, \$3,600. (4) It is payable at a fixed time, November 15, 1911. (5) It is payable to the order of C. W. Green. The instrument recites that the makers have purchased from C. W. Green the Percheron stallion Bobino, but this addition does not transgress any provision of the Negotiable Instruments Act; on the contrary, such a recital is specifically authorized. Section 5851 provides that an unqualified promise is unconditional within the meaning of the Act, though it is coupled with a statement of the transaction which gives rise to the instrument. This writing in question also provides: (a) That the indebtedness shall bear interest at a fixed rate, payable semi-annually; (b) that upon default in the payment of an interest installment the principal sum, with interest, shall become due; and (c) that the makers shall pay an attorney fee in case it is necessary to enforce collection of the



indebtedness. Provision is made in the Negotiable Instruments Act for all of these apparent qualifications to the terms of the definition. Section 5850, subdivision 1, covers the first; subdivision 3 the second; and subdivision 5 the third. This leaves nothing of the instrument except the following: "We hereby authorize the delivery of said horse to any one of the subscribers hereto." Respondent's counsel direct our attention to the fact that the promise to pay is coupled with an order for the delivery of the horse. Even so, it does not affect the negotiable character of the instrument. It still meets every requirement of the definition contained in section 6032, above.

The statement of our reason for the decision in *State v. Mitton*, 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 926, is not as clear as it might have been, though the correctness of the conclusion upon the character of the instrument there involved cannot be questioned. That writing contained an order for school supplies to be shipped "subject to approval," and this clearly rendered the promise to pay conditional—conditioned upon the approval of the goods ordered. The decision in *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, was rendered under a different statute and is not in point here.

The writing in question is a negotiable, promissory note within the meaning of our Code. (See Crawford's Annotated Negotiable Instruments Law, 4th ed., p. 17.)

But counsel for respondent insist that the pleadings raise an issue as to plaintiff's ownership of the note and as to whether defendant ever signed the instrument in question, and that the general verdict in favor of the defendant is, in effect, a finding that plaintiff is not the owner of the note, and that defendant's [3, 4] signature thereto is a forgery. It follows, of course, that if plaintiff has no title to the note, it cannot maintain this action, and it is equally clear that, if defendant's signature to the instrument is a forgery, and he is not precluded from setting up this defense, he cannot be held to the original payee or to anyone else; but the general verdict was apparently prompted solely by the finding of no consideration. In an action by Green,

the original payee, that finding would be conclusive. The defenses of want of title in plaintiff and forgery of defendant's signature were equally available whether the instrument be negotiable or non-negotiable; so that the only defense to which the court's instruction No. 2 could have referred properly was the defense of want of consideration, and that instruction therefore, in effect, charged the jury: "If you find that there was not any consideration for the instrument as between Green and Barrett, then your general verdict must be for the defendant." In view of our decision that the instrument is negotiable in character, this instruction is erroneous, as was likewise the theory upon which the case was tried.

The judgment and order are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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IN RE WILLIAMS' ESTATE. WILLIAMS, RESPONDENT, v.  
DAVIS ET AL., APPELLANTS.

(No. 3,726.)

(Submitted March 23, 1916. Decided May 11, 1916.)

[157 Pac. 963.]

*Appeal and Error—Costs on Appeal—Order of Supreme Court  
—Jurisdiction of District Court—Taxing Costs.*

Costs on Appeal—Order of Supreme Court—Taxing Costs—District Courts—Jurisdiction.

1. Over an order made by the supreme court granting a new trial "at the costs of respondents," which became final upon issuance of the *remittitur*, the district court had no jurisdiction; hence a motion of respondents to tax costs was properly denied.

Appeal and Error—Taxing Costs—Nonappealable Orders.

2. The costs incurred become a part of the judgment, and their disposition is reviewable only on an appeal from that judgment, and not from an order taxing or refusing to tax them.

[As to allowance of costs and counsel fees to unsuccessful party in suit to construe will, see note in *Ann. Cas.* 1915C, 714.]

*Appeal from District Court, Silver Bow County, in the Second Judicial District; J. Miller Smith, Judge of the First District, presiding.*

PROCEEDING by Andrew J. Davis and another for the probate of the will of Rachel E. Williams, deceased, contested by Dorothy Alice Williams, by her guardian, Sibyl Scott. A judgment admitting the instrument to probate, and an order refusing a new trial were reversed on appeal, and a new trial ordered at the cost of proponents. From an order denying a motion to the district court to tax costs against the funds of the estate, proponents appeal. Affirmed.

Cause submitted on briefs of Counsel.

*Messrs. Shelton & Furman and Mr. J. A. Poore, for Appellants.*

Ordinarily, the proponent of a will is entitled to recover his costs out of the estate, whether he be successful or not, because it is his duty to present the will for probate. (40 Cyc. 1362, and cases cited.) And since it is the duty of an executor or one having possession of a paper purporting to be the last will of a decedent to produce and file the same for probate, in the event of a contest which is determined adversely to the will, he is not personally liable for costs, in the absence of a showing of bad faith. (40 Cyc. 1363; Abbott's Probate Law, secs. 657, 391.)

*Mr. J. E. Healy, for Respondent.*

Broadly speaking, parties to a will contest must bear their own costs. (Borland on Wills, sec. 89, note 48, and cases cited.) The court may not exercise its discretion as to costs or attorneys' fees in favor of the proponents where the will has not been admitted to probate. (*Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Marrey's Estate*, 65 Cal. 287, 3 Pac. 896; *Jessup's Estate*, 80 Cal. 625, 22 Pac. 260; *McKinney's Estate*,

112 Cal. 447, 44 Pac. 743.) The costs of the first trial and second trial are properly taxable. (*Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563; Kerr's Code Civ. Proc., sec. 1021, p. 1538.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

When this cause was before us on the first appeal (50 Mont. 142, 145 Pac. 957), the judgment and order were reversed, and a new trial ordered "at the cost of the respondents." When appellant presented her memorandum of costs incurred on appeal, respondents moved the district court to tax all proper costs against the funds of the estate and not against them individually, and appealed from the order denying their motion.

In determining the appeals as was done, the disposition of [1] the costs was within the discretion of this court. (Secs. 7158, 7718, Rev. Codes.) We directed that the costs of appeal be charged against the respondents. We were not requested to modify that order, and it became final when the *remittitur* issued. Over that order the district court had no jurisdiction except to enforce it. It might determine disputed items of cost (*State ex rel. Hurley v. District Court*, 27 Mont. 40, 69 Pac. 244), but it could not change or modify the order as made [2] by this court. The costs incurred in the district court became a part of the judgment, and their disposition is reviewable only on an appeal from that judgment. (*Ferris v. McNally*, 45 Mont. 20, 121 Pac. 889.)

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## STATE, RESPONDENT, v. WILLIAMS, APPELLANT.

(No. 3,863.)

(Submitted May 3, 1916. Decided May 13, 1916.)

[157 Pac. 957.]

*Gaming—Possession of Implements—Faro—Evidence—Sufficiency.*

1. Evidence showing that defendant had in his possession or control a faro lay-out contrary to section 8417, Revised Codes, held sufficient to warrant conviction, proof that he also had a dealer's box—without which the game of faro cannot be played—not being necessary to complete the offense.

[As to rebuttal presumptions as evidence, see note in *Ann. Cas.* 1913E, 977.]

*Appeal from District Court, Silver Bow County; Michael Donlan, Judge.*

C. A. WILLIAMS was convicted of a violation of the gaming law, and appeals from the judgment of conviction. *Affirmed.*

Cause submitted on briefs of Counsel.

*Mr. George D. Toole*, for Appellant.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. Wm. H. Poorman*, Assistant Attorney General, for Respondent.

MR. JUSTICE SANNER delivered the opinion of the court.

The appellant was accused, tried and convicted of a violation of section 8417, Revised Codes, the charge being that at the time and place mentioned in the information he did willfully and unlawfully, *etc.*, "have in his possession and under his control and did keep" in a certain room, in Butte, occupied by him, "gambling implements, to-wit, a faro lay-out," *etc.*; and he seeks a reversal of the judgment against him, principally because, as he contends, the evidence is insufficient.

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Authorities on the question of power to seize gambling devices in absence of charge of violation of laws against gambling, see note in *L. R. A.* 1915A, 232.

The record discloses that on December 27, 1915, the appellant's room was visited by the police and others, who therein seized certain gambling devices, including what some of the witnesses call "a faro lay-out," besides \$192.50 in silver wrapped up in a "crap cloth." The devices so found constituted, according to at least one of the witnesses, all the paraphernalia used to conduct the game of faro, except the "dealer's box." The contention is that the term "faro lay-out," as used in section 8417, means the complete outfit requisite to conduct the game of faro, and, as the game cannot be carried on without the dealer's box, the failure to find that entitles the appellant to his discharge. This is not correct. According to standard authorities, there are for the game of faro two essentials and various accessories; the essentials are the "dealer's box" and the "lay-out," the latter being a board commonly covered with green cloth to which the entire spade suit is affixed in a certain order. (3 Century Dictionary, 2144; Standard Dictionary, 20th Century ed., 662; 10 Britannica, 11th ed., 186; Foster's Complete Hoyle, p. 487.) That this was known to and appreciated by the legislature in framing section 8417 is clear from the fact that, omitting the colorless accessories, it fixed upon the essentials and denounced as a crime the possession of either the dealer's box or the lay-out—a meaningless provision if the dealer's box were in legislative contemplation a necessary part of the lay-out itself. The possession of the "lay-out" as defined above was amply established; the case was therefore properly submitted to the jury, who were authorized to accept or reject the appellant's explanation of such possession. Their verdict cannot be disturbed.

Some minor errors of a procedural character are also assigned, but examination of them fails to disclose anything to call for a reversal.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

STATE EX REL. McGRADE ET AL., RELATORS, v. DISTRICT COURT ET AL., DEFENDANTS.

(No. 3,831.)

(Submitted May 11, 1916. Decided May 19, 1916.)

[157 Pac. 1157.]

*Office and Officers—Removal—Nature of Proceeding—County Attorneys—Disqualification—Appointment of Substitute—Power of District Court—Compensation.*

Office and Officers—Removal—Disqualification of County Attorney—Appointment of Substitute—Power of District Court.

1. Proceedings for the removal of a public officer under section 9006, Revised Codes, being of a criminal nature, the district court is empowered by section 9309 to appoint some attorney in such a proceeding to perform the duties of the county attorney whenever the latter is absent on account of either neglect or sickness, or is disqualified for any reason.

[As to removal of public officers for cause, see note in 135 Am. St. Rep. 250.]

Same—Statutes.

2. The power granted to the district court by section 9005, Revised Codes, in a proceeding looking to the removal of the county attorney, to appoint the county attorney of an adjoining county to act as prosecuting officer, may only be exercised when charges are preferred by a grand jury under section 8992.

Same—Compensation of Substitute for County Attorney.

3. An attorney appointed under section 9309, Revised Codes, to perform the duties of a county attorney in a proceeding in which the latter was sought to be removed upon the accusation of a taxpayer charging neglect of duty, may not demand or receive compensation for his services out of the county treasury, the statute not making any provision therefor, and the county not being liable as upon an implied contract to pay what the services are reasonably worth.

Same.

4. A county attorney called into an adjoining county by appointment under section 9005, Revised Codes, to act as prosecuting officer in a proceeding of the nature of that referred to in paragraph 2, *supra*, is not entitled to compensation for services thus rendered.

Original application by the State, at the relation of Barney McGrade and others, for a writ of *certiorari*, against the District Court of Silver Bow County, and Michael Donlan, a judge thereof. Order complained of annulled.

Messrs. M. F. Canning, A. B. Melzner and Dan T. Malloy, for Relators, submitted a brief; Mr. Malloy argued the cause orally.

*Mr. Frank Walker* and *Mr. T. F. Shea*, for Respondents, argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

*Certiorari.* The facts disclosing the ground of the application are these: On January 10 of this year, John Johnson, filed in department 3 of the district court of Silver Bow county an accusation charging M. F. Canning, the county attorney of Silver Bow county, with neglect and failure to perform his duty as such officer in the enforcement of the gaming laws of the state, and demanding that he be removed from office. When in response to a citation Canning appeared and entered his plea of not guilty, Honorable Michael Donlan, the judge presiding, by formal order called upon T. F. Shea, Esq., county attorney of Powell county, to prosecute the accusation. Powell county does not adjoin Silver Bow county. Mr. Shea appeared and assumed charge of the proceedings. The trial was set for February 16. Pending the examination of witnesses for the accuser, Mr. Shea moved for a dismissal of the accusation. The motion was sustained and judgment of acquittal was entered. On March 2 Mr. Shea presented to the county auditor of Silver Bow county, for allowance for his services, a claim for \$500. The auditor refused to allow it. On March 6, upon application of Mr. Shea and as a part of the proceedings in the matter of the accusation, the court made an order which, omitting recital of the action taken by the auditor, reads: "It is hereby ordered and this does order, that the board of county commissioners of Silver Bow county and Gus Stromme, Barney McGrade, Otto Simonson, members of said board, and the county clerk and recorder of Silver Bow county, Montana, and the county treasurer of Silver Bow county, approve said claim; issue a warrant upon the treasury of said county for the payment of said sum from the funds of the county of Silver Bow, and pay said warrant out of the funds of the treasury of Silver Bow county, in its proper course." On March 10 the officers



named in the order filed a motion to have it vacated. The court overruled the motion. Thereupon this proceeding was instituted to have the order annulled on the ground that the court was without power to make it.

The solution of the question presented requires notice of [1] several provisions of the Revised Codes touching the power of the district court to appoint a substitute for the county attorney in criminal cases, and an answer to the inquiry what provision, if any, is made for the compensation of the substitute by the county, and how the amount is to be fixed. That the court has power to make such an appointment in a proceeding under section 9006 of the Revised Codes, for the summary removal of a public officer, we have no doubt. The proceeding, though it may be instituted by a private person, is a public proceeding, and, except that it is summary in its nature, is to be classed as a prosecution for crime. (Rev. Codes, sec. 8107; *State ex rel. Rowe v. District Court*, 44 Mont. 318, Ann. Cas. 1913B, 396, 119 Pac. 1103; *State v. Driscoll*, 49 Mont. 558, 144 Pac. 153.) In *State ex rel. Rowe v. District Court*, *supra*, it was referred to as a *quasi*-criminal proceeding; yet, since under section 9006 the result of a conviction is removal from office, and this is defined by section 8107 as a punishment for a crime, the qualifying term "*quasi*" might as well have been omitted. Therefore, except when he is himself the accused, the duty devolves upon the county attorney to prosecute. (Rev. Codes, sec. 3052.) Section 9309, found in Chapter II, Title VIII, Part II, relating to trials in criminal cases, provides: "If the county attorney fails to attend at the trial, the court must appoint some attorney at law to perform the duties of the county attorney before the grand jury or otherwise." Any fair construction of this provision leads to the conclusion that the purpose of the legislature in enacting it was to empower the court to appoint some attorney to perform the duties of the county attorney whenever, owing to the existence of an emergency created by the absence of this officer caused by his negligence, sickness or disqualification, the latter cannot or ought not to

act. Obviously when, with reference to the business on hand, he is wholly disqualified to act by reason of personal interest in it, he may not undertake to act. In such an emergency the court must necessarily have the same power as when the failure to appear is attributable to negligence or disability. Otherwise the accident of his disqualification would wholly interrupt the business of the court.

In appointing Mr. Shea, the court evidently proceeded under [2] section 9005. Apparently this section applies to proceedings instituted by charges preferred by a grand jury under section 8992. We incline to the opinion that it does, for the reason that it refers only to a case in which an accusation is presented by a grand jury. This being so, the calling in of Mr. Shea in his official capacity cannot be upheld under it, for it does not confer upon the court the power to impose any duty upon a county attorney of another county as such, except in the particular emergency named. Nor does it authorize the calling in of a county attorney from any other than an adjoining county. Even so, section 9309 is broad enough to warrant the appointment of some attorney in any criminal case when the emergency contemplated by it arises; and while in making its selection of the attorney the court will usually choose someone from among the local attorneys, it is not required to do so. It may for the best of reasons be compelled to call upon an attorney residing in another county, as, for illustration, when the local attorneys who are otherwise competent may also themselves be disqualified.

It results from the foregoing considerations that while Mr. Shea was authorized by his appointment to appear and prosecute the accusation, he appeared in his capacity as attorney, and not in his official capacity as county attorney. This brings [3, 4] us to the question whether an attorney appointed to perform the duties of the county attorney in the emergency contemplated by the statute is of right entitled to demand and receive compensation for his services out of the county treasury. We do not find any provision of the statute so declaring. We

think that if Mr. Shea had been called under the authority conferred by section 9005, he would not have been entitled to any compensation, for his appearance would have been in an official capacity in obedience to a requirement which the district judge would have been authorized to make of him as an officer. His services in this capacity would include all the duties imposed upon him by law, and his compensation is his salary, the amount of which is fixed by statute. (Const., Art. VIII, sec. 19; Rev. Codes, secs. 362, 3052-3056, 3116.)

It is contended, however, that though the statute does not provide any compensation, still inasmuch as the services were rendered by Mr. Shea, the county is liable as upon an implied contract to pay what they were reasonably worth. This contention is disposed of, we think, by former decisions of this court. In the early case of *Johnston v. Lewis and Clark County*, 2 Mont. 159, the question presented was whether an attorney appointed to defend an indigent person accused of crime was entitled to compensation for his services. The statute then in force (Crim. Prac. Act, sec. 196; Codified Stats. 1871-72, p. 220), required the court to appoint attorneys in such cases, but made no provision for their compensation. The court held that though attorneys so appointed must perform the duties assigned them, they could not recover compensation from the county: (1) Because there was no provision of law for their compensation; and (2) because it was a part of their general duties to render services in such cases when required to do so. In a concurring opinion, Mr. Chief Justice Wade said: "The statute provides that it shall be the duty of the court to assign counsel to defendants in certain cases, of which this case is one; and the plaintiff rests his case against the county upon the theory that, when the law requires a service to be performed, the presumption necessarily arises that compensation shall be awarded therefor, and that no service can be required unless payment is provided. This would be a forcible proposition to urge before a legislature whose province it is to make laws, but before a court the law must be taken as it is, and not as it ought

to be. The statute does require the service, and it does not provide any means for payment."

In *Sears v. Gallatin County*, 20 Mont. 462, 40 L. R. A. 405, 52 Pac. 204, a claim had been presented by plaintiff to the board of commissioners of the county for allowance for services as a member of a *posse comitatus*. This court held that he could not sustain his claim, quoting with approval the following from *State v. Baldwin*, 14 S. C. 135: "One who renders service to the state, for which there is no compensation provided by statute cannot, as in the case of services rendered to a private person, raise an implied *assumpsit* against the state, and for such service he has no legal claim, \* \* \* no claim which can be enforced by law."

Again, in *Wade v. Lewis and Clark County*, 24 Mont. 335, 61 Pac. 879, the court had before it the question whether under a statute then in force a county surveyor was entitled to mileage for the distance actually traveled in the discharge of his official duties. The statute provided that: "The county surveyor of each county shall receive as full compensation for the performance of his duties as county surveyor, in connection with the roads and otherwise, the sum of five dollars per day." The conclusion was that this officer was not entitled to such mileage because the statute did not impose upon the county liability for it.

After the decision in *Johnston v. Lewis and Clark County*, *supra*, the legislature enacted a provision under which attorneys appointed to defend indigent defendants in criminal cases might claim and receive compensation from the county in an amount to be fixed by the court as therein prescribed. (Laws 1881, p. 12.) And a like provision is found in section 9189 of the Revised Codes. As we have already said, there is no provision allowing compensation for services performed in pursuance of an appointment under section 9309, *supra*. Since this is so, the court cannot charge the county with it. As was aptly said by Chief Justice Wade in *Johnston v. Lewis and Clark County*, *supra*: "Money can only be drawn from the county treasury

in pursuance of the statute, and as authorized by law, and any order drawn on the treasury without this authority is void. There is no statute in the territory authorizing courts to order attorneys to be paid from the county treasury for services rendered in defending prisoners; there is no statute authorizing the board of commissioners to draw an order on the treasury in payment for such services; and there is no statute authorizing the county treasurer to pay for such service; and in the absence of authority it would be simply judicial legislation, or worse, for the courts to open the door of the treasury to any demands not authorized by law." The same rule applies here. Courts cannot legislate; much less may a district court in exercising the authority conferred by the statute create a liability when the legislature has not sanctioned it. Its authority is confined exclusively to the appointment of an attorney to perform the duty required, and does not extend to the employment of an attorney for the county, thus fixing a liability upon the county for any amount.

It may be contended that the state cannot lawfully exact services of an attorney in such cases without compensation. This question we are not required to decide. If it cannot, the attorney is not obliged to perform the services. If he does, he acts with full knowledge that the legislature has made no provision for his compensation, and he cannot demand any.

The district court had no authority to make the order. It is therefore annulled.

*Order annulled.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

## HILL, APPELLANT, v. RAE, STATE TREASURER, RESPONDENT.

(No. 3,870.)

(Submitted May 22, 1916. Decided June 2, 1916.)

[158 Pac. 826.]

*Injunction—Farm Loan Act—Constitutional Law—Equal Protection of Laws—Appropriations—Lending Credit of State—Exemptions—Recordation Fees—Mortgages.**Injunction—Taxpayer's Suit—District Court—Jurisdiction.*

1. The district court had jurisdiction to hear, and a citizen and taxpayer could maintain, a suit to enjoin the state treasurer from issuing, negotiating or selling bonds pursuant to the provisions of the Farm Loan Act (Chap. 28, Laws 1915).

*Constitutional Law—Equal Protection of the Laws—Discrimination.*

2. Within the meaning of the Fourteenth Amendment to the United States Constitution, a privilege conferred upon one class is a discrimination in favor of that class and against all others not similarly favored, as a burden upon one class is a discrimination against it and in favor of all others not similarly burdened.

[As to the constitutional requirement of equal protection of laws, see note in 25 Am. St. Rep. 873.]

*Same.*

3. A privilege or a burden is or is not a denial of the equal protection of the laws, under the Fourteenth Amendment, *supra*, according to whether the discrimination relates to a matter upon which classification is legally permissible, and, if so, whether the classification is a reasonable one.

*Same—Classification—To be Upheld, When.*

4. If the classification adopted by the legislature in enacting a statute conferring a privilege is practical, it is not reviewable unless palpably arbitrary.

*Same—Construction of Statutes—Wisdom of Legislation—Province of Court.*

5. In determining the constitutionality of a statute, the supreme court may not concern itself with the accuracy or wisdom of the view entertained by the legislature in making it.

*Farm Loan Act—Constitution—Equal Protection of the Laws.*

6. Held, that the Farm Loan Act (Chap. 28, Laws 1915), in selecting the agricultural interests of the state as the beneficiary of its provisions to the exclusion of others, and in discriminating in favor of such farmers only who are able to offer a certain kind of security, thus excluding all those who have less desirable or no security at all, is not unconstitutional as denying the equal protection of the laws.

*Same—Appropriations—Constitutionality.*

7. Section 12, Article XII, of the state Constitution, forbidding appropriations for a longer term than two years, operates as an automatic limit, so that an unlimited appropriation as to time will expire at the end of two years, and is not void *ab initio*.

**Same—Appropriations—Separate Bills.**

8. Where an appropriation is a mere incident to a larger, but single, subject of legislation—such as the creation of a Farm Loan Commission under Chapter 28, Laws of 1915, and providing funds for its inauguration and conduct—it need not be made by separate bill as otherwise required by section 33, Article V, of the Constitution.

**Same—Appropriations—Lending Credit of State—Constitution.**

9. *Held*, that the provision of Chapter 28, Laws of 1915, appropriating \$20,000 to serve as a guaranty fund to assure prompt payment of interest on farm loan bonds, is void under section 35 of Article V of the Constitution, because the funds thus appropriated are "not under the absolute control of the state," and under section 1, Article XIII, because by it the credit of the state is given as an assurance for the benefit of those who may become lenders under the Act.

**Statutes—Constitution—Partial Invalidity.**

10. The insertion of a void provision in an Act otherwise valid does not render it inoperative as a whole unless the objectionable clause is indispensable to its operation or constituted the inducement to its enactment.

**Farm Loan Act—Fees—Exemptions—Power of State.**

11. The state could properly exempt itself or its officers from the payment of recording fees on mortgages given under the Farm Loan Act.

**Mortgages—Recordation—Fees—By Whom to be Paid.**

12. Recording fees are to be paid by those whose interests are protected by recordation—in case of mortgage, by the mortgagee.

**Farm Loan Act—Exemptions—Equal Protection of Laws.**

13. Inasmuch as the exemption from payment of fee for recording the mortgage placed upon his land for a loan obtained under the Farm Loan Act is not for the benefit of the farmer—the borrower—but for that of the lender—the real mortgagee—the discrimination between the latter and all other mortgagees *held* to vitiate the Act so far as the exemption is concerned, under the equal protection of the law clause of the Constitution.

**Statutes—Constitutionality—Who may not Question.**

14. One not prejudicially affected by unconstitutional clauses of a statute is not entitled to complain of its unconstitutionality.

*Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.*

SUIT by George H. Hill to enjoin William C. Rae, as State Treasurer of the State of Montana, from issuing, negotiating or selling bonds pursuant to the Farm Loan Act. Judgment for defendant, and plaintiff appeals. Affirmed.

*Messrs. Wight & Pew*, for Appellant, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

In behalf of Respondent, there was a brief by *Mr. J. B. Poindexter*, Attorney General, *Mr. Wm. H. Poorman* and *Mr.*

*Chas. S. Wagner*, Assistant Attorneys General, and oral argument by *Mr. Poorman* and *Mr. Wagner*.

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiff, alleging his status as citizen and taxpayer of Lewis and Clark county, Montana, brought this suit to enjoin the defendant, as state treasurer, from issuing, negotiating or selling certain bonds pursuant to the provisions of Chapter 28 of the Laws of 1915, commonly called the Farm Loan Act. Claim to the relief sought is based upon the contention that the Act is unconstitutional, and that, in connection with the proposed issue, negotiation and sale of bonds thereunder, the defendant has expended, and, unless restrained, will expend, large sums of money belonging to the state. The defendant demurred, questioning the plaintiff's main contention, his right to maintain the suit, and the power of the court to hear it. The demurrer was sustained, not, however, on either of the technical grounds assigned, and the plaintiff, refusing to plead further, suffered judgment of dismissal to be entered. This appeal is from that judgment.

1. The defendant again insists that the court had no jurisdiction to hear this suit, and the plaintiff none to maintain it—the former because “an injunction cannot be granted \* \* \* to prevent the execution of a public statute, by officers of the law, for the public benefit” (Rev. Codes, sec. 6121); the latter because it does not appear that the plaintiff will suffer any other or different injury than the taxpayers of the state in general. The assumption that the Farm Loan Act or its execution is for the public benefit begs the whole question; while the plaintiff's right as citizen and taxpayer to maintain such a suit as this is settled by a long line of decisions in this state, extending from *Chumasero v. Potts*, 2 Mont. 242, to *Poe v. Sheridan County*, 52 Mont. 279, 157 Pac. 185.

2. In its general scope and purpose the Farm Loan Act is [2] assailed as obnoxious class legislation, or a denial of the equal protection of the laws, contrary to the Fourteenth Amend-



ment to the national Constitution. Whether this is so or not depends on what the Act designs to do, how it designs to do it, and what may be its effect upon those without as well as those within its scope. It may be analyzed as: (1) Creating a department of farm loans, for which the state treasurer is the commissioner or head, the several county treasurers are local representatives, the attorney general is the legal adviser, the state examiner is the auditor, and the several county attorneys are, as such, required to render legal service; (2) imposing upon that department the duty to formulate and receive applications for loans on nonurban property, to require and pass upon proof of title, productive value and other facts pertinent to the security offered, to formulate all mortgages given to secure such loans and be named as mortgagee therein, to formulate, issue and offer for sale the bonds intended as evidence of such loans, to collect all payments as they become due, and to pay the bonds as they mature according to the scheme set forth; (3) prescribing the character of property which shall be accepted as security and how it shall be held as such, the general nature of the bonds, the rate of interest they shall bear, how they shall mature, where they shall be payable, the manner in which payments shall be taken up, and the means to be employed in caring for cases of default; (4) appropriating \$25,000 out of the state treasury, of which \$5,000 is to be used for administrative purposes, but to be recouped, so far as may be, by taking one-eighth of each payment required of the mortgagors, and \$20,000 to serve as a guaranty fund to assure the prompt payment of maturing bonds, with interest, and to be recouped by the proceeds of foreclosures against defaulting debtors, or, if necessary, by assessments upon nondefaulting owners whose mortgages are security for the same series of bonds; and (5) exempting from recording fees and from taxation the mortgages given to secure such loans. In short, for reasons not declared in the Act itself, it designs to assist agriculturists in securing loans on their real estate by and through the activities of a public department, aided to greater or less

extent by public funds, and thus to confer upon that particular class certain privileges not as yet enjoyed by any other.

In the application of the Fourteenth Amendment to the Constitution of the United States no distinction is to be observed between the effect of privileges conferred and the effect of burdens imposed. A privilege conferred upon one class is a discrimination in favor of that class and against all others not similarly endowed, as a burden upon one class is a discrimination against it and in favor of all others not similarly afflicted. But a discrimination is not necessarily unlawful merely because it is a discrimination. Indeed, the greater part of all legislation is discriminatory either in the extent to which it operates, the manner in which it applies, or the objects sought to be attained by it; and we are commanded by the highest judicial authority of the land "to be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights." (*Noble State Bank v. Haskell*, 219 U. S. 104, Ann. Cas. 1912A, 487, 32 L. R. A. (n. s.) 1062, [3] 55 L. Ed. 112, 31 Sup. Ct. Rep. 186.) A privilege, or a burden, is or is not a denial of the equal protection of the laws, according to whether the discrimination relates to a matter upon which classification is legally permissible, and, if so, whether the classification is a reasonable one. That classification is permissible, because in the essential nature of things and in any due appreciation of equality in the operation of the law it is necessary in legislation for purposes of revenue, or in the application of the police power strictly so called, or in legislation designed to increase the industries of the state, develop its resources, or add to its wealth and prosperity, is abundantly settled by judicial decision as well as by the course of legislation. To cover the entire field of this subject is impossible within any reasonable limits. Suffice it to say that by the supreme court of the United States, construing this very amend-

ment, classifications have been sustained based upon differences in the amount of legacies, differences between corporations, differences between land dependent on its use for agricultural and other purposes, differences between fire insurance and other insurance, differences in the character of work, differences between hiring persons to labor in the state and hiring persons to labor out of the state, differences between sugar refineries based entirely on whether the sugar refined was purchased or produced by the refiner, as well as various other differences too numerous to mention. (*Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; *Clark v. Kansas City*, 176 U. S. 114, 44 L. Ed. 392, 20 Sup. Ct. Rep. 284; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. Rep. 633; *Petit v. Minnesota*, 177 U. S. 164, 44 L. Ed. 716, 20 Sup. Ct. Rep. 666; *Williams v. Fears*, 179 U. S. 270, 45 L. Ed. 186, 21 Sup. Ct. Rep. 128; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. Rep. 43, and cases cited in these decisions.)

In *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357, Mr. Justice Field, speaking for the court, said: "Neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual incon-

venience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions."

In *Clark v. Kansas City, supra*, a state statute was under consideration which authorized certain cities to annex lands adjoining the city limits, but provided that "nothing in this Act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation," and the court upheld the distinction, declaring that it was justified by the principle of the cases cited above: "That principle leaves to the state the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in the lands actually used for agriculture."

In *American Sugar Refining Co. v. Louisiana, supra*, a state statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses, but exempting from its operation "planters and farmers grinding and refining their own sugar and molasses," was sustained with the remark that: "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

So, too, legislative activity having for its avowed purpose the encouragement of this or that particular industry deemed of importance to the state has been prolific of results. We need not go beyond the boundaries of our own commonwealth for instances which now form part and parcel of our very political and economic life. We cite the state board of stock commissioners, the state board of sheep commissioners, and the live-stock sanitary board, specifically charged with the supervision and protection of the stock interests of the state, together with the considerable mass of legislation enacted to foster this industry; the state board of horticulture, with the laws for the

prevention and eradication of insect pests and plant diseases, distinctly held by this court to be a valid exercise of the power vested in the state to promote the general welfare (*Colvill v. Fox*, 51 Mont. 72, 149 Pac. 496); the bureau of agriculture and publicity and the bureau of labor and industry, whose functions are to further, in certain ways, "the agricultural, commercial, mining, manufacturing and labor interests of the state"; the state fair; our extensive Code of labor statutes, including the regulations for mining, and the laws for the compensation of injured workmen; the state board of poultry husbandry; the maintenance of experiment stations, substations and county agriculturists; our provisions for the organization of irrigation and drain districts; and, in part, the institution and maintenance of the Agricultural College and the School of Mines themselves. In the face of all that has been said and done in this connection, it is too late to claim that the mere selection of a given industry or pursuit for favorable consideration by the state is a denial to others of the equal protection of the law.

Plaintiff urges as decisive against the Act that in *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833, this court, following the decision of the national supreme court in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431, held an anti-trust law of this state to be invalid as a denial of the equal protection of the laws because, though forbidding persons, corporations and associations generally from combining to fix prices, regulate production or create restrictions in trade, it exempted from its operation "persons engaged in horticulture or agriculture with a view of enhancing the price of their products." The idea underlying both these decisions is that if, in the large design to protect the public from extortion, combinations to control prices should be forbidden, all should be, because, with reference to that design, no legitimate distinction can be made among them. This is apparent from the fact that in the *Connolly Case* the court, reasserting the right of the states to classify, insists that classification "must always rest

upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed."

[4] It does not follow, however, that the object in respect to which the classification is made must commend itself to "certain preconceived and deeply rooted notions of lawyers" (*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 204, 119 Pac. 554), or that the classification must always depend "on scientific or marked differences in things or persons or relations; it suffices if it is practical, and it is not reviewable unless palpably arbitrary." (*Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 43 L. Ed. 552, 19 Sup. Ct. Rep. 281.)

The question then is whether, within the lines thus drawn, [5, 6] the selection of agriculturists for the particular form of consideration here accorded can be justified. We think it can, bearing in mind that with the accuracy or wisdom of the legislative view we may not concern ourselves. (*Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Magoun v. Illinois T. & S. Bank*, *supra*; *Atchison, T. & S. F. R. R. Co. v. Matthews*, 174 U. S. 96, 102, 43 L. Ed. 909, 19 Sup. Ct. Rep. 609; *Clark v. Kansas City*, *supra*; *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400, 23 Sup. Ct. Rep. 272.) It is a matter sufficiently notorious to charge the court with judicial knowledge that, according to the federal census of 1910, approximately one-third of our productive population is engaged in agriculture. From time immemorial it has been fully realized that the economic relations of that pursuit to all other forms of human activity are of the first importance; other things, other occupations, may be dispensed with at more or less cost to society, but without agriculture, civilization itself must fail. For several years last past there has been growing the conviction, based to some extent on government investigations and reports, that farmers requiring money to carry on and extend their operations are subjected to disadvantages which, not altogether necessary and not suffered by other classes, seriously hamper, if they do not imperil, the progress and welfare of agriculture. The rectification of this condition has engaged and is engaging the at-

tention of Congress as well as the attention of several of the states. At the general election of 1914 the people of this state undertook to aid in the solution of the problem by means of the initiative, authorizing farm loans to be made out of the school funds, and the governor in his annual message to the Fourteenth Legislative Assembly directing notice to certain constitutional objections which had been raised against such use of school funds, urged the subject of farm loans upon the legislative mind. In the light of these circumstances it is impossible to avoid the conclusion that the subject appeared to be one "held by the strong and preponderant opinion to be greatly and immediately necessary to the public welfare" (*Noble State Bank v. Haskell, supra*), and that, whether wisely or not, the legislature, in enacting the law in question, did believe that it was legislating to develop the resources of the state and to add to its prosperity. It is not our province to assert that this was a mistaken belief.

It is urged, however, that the Act is unequal, even as respects the agricultural class, because farmers who have only chattel security and farmers who have no security cannot avail themselves of its provisions. This argument mistakes the purpose of the Act; for it surely is not sound criticism that such purpose was not to further improvidence nor to furnish a panacea for all the financial ills to which the farmer, like the most of us, is heir. The legislative view undoubtedly was that the capital necessary to enlarge and develop our productive area could best be acquired by individual long-time loans at a moderate rate of interest. But to every lender, particularly to the makers of such loans, assurance of repayment with interest is a commanding factor; and the Act cannot be condemned because it does not attempt the impracticable task of procuring long-time loans at moderate interest on chattel security or on no security at all. In our opinion, the Act is general so far as it goes, because the conditions of security exacted by it are adapted to the character of loans which its aid is offered to obtain, and because such aid is open to all who comply with these conditions.

We see nothing in the general scope and purpose of the Act which constitutes a denial of the equal protection of the laws.

3. Because of the appropriation it contains, the Act is further assailed as contrary to sections 33 and 34 of Article V, section 12 of Article XII, and section 1 of Article XIII of our state Constitution.

Conceding that the appropriation is not limited in terms as to time, it is our opinion that the provision in section 12, Article XII, forbidding appropriations for a longer term than two years, operates as an automatic limit, so that the appropriation, if otherwise valid, would expire at the end of that time, rather than to void it *ab initio*.

Nor do we think there was any violation of section 33, Article V, which provides that appropriations, other than for the ordinary expenses of the legislative, executive and judicial departments of the state, interest on the public debt, and for public schools, "shall be made by separate bills, each embracing but one subject." Counsel for appellant construes this to mean that appropriations for a special purpose shall in all cases be made by a bill containing nothing but the appropriation itself. Where the appropriation constitutes the entire purpose in view, this is doubtless correct; but it is not correct if the appropriation is a mere incident to a larger, but still single, subject of legislation. There is no violation of this provision where the legislature establishes a bureau or commission, and appropriates funds for its inauguration or to carry out the objects for which it was created.

"No appropriation shall be made," says section 35 of Article V, "for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state," and, says section 1 of Article XIII, "neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation." The appropriation in this Act has two defined purposes, *viz.*:



Five thousand dollars to set in motion the department created by the Act, to which extent it cannot be assailed as contravening the provisions quoted; and \$20,000 to serve as a guaranty fund to assure lenders that the interest on maturing bonds will be promptly met, whether the mortgagors have made their payments or not. Manifestly, this sum of \$20,000 is both an appropriation and a credit assurance; for it is no longer available as a part of the public funds, and it is set apart as a guaranty fund to be drawn upon to make good *pro tempore* the defaults of mortgagors. It will not suffice to say that, the general purposes of the Act being to foster agriculture, and thus to promote the public welfare, such purpose is a public one; in the broad sense considered above it is so, and so, likewise, are all the purposes mentioned in section 35 of Article V; yet money for them may not be appropriated unless the specific objects are under the absolute control of the state. The ultimate purpose of the Farm Loan Act comes fairly within the term "industrial," as used in section 35 of Article V; but it is not, so far as the use of this fund is concerned, under the absolute control of the state, for the obvious reason that the state cannot direct the conduct or judgment of mortgagors in the handling of their property, nor anticipate or prevent the cases of default which are to be the occasion for such use. Nor does the fact that the fund is to be recouped as used, save it from the ban of the Constitution, because, whether used or not, it stands as an appropriation and an assurance for the benefit of the individuals who may become lenders under the Act. (*In re Relief Bills*, 21 Colo. 62, 39 Pac. 1089; *Fox v. Mohawk etc. Soc.*, 165 N. Y. 517, 80 Am. St. Rep. 767, 51 L. R. A. 681, 59 N. E. 353.)

It does not follow, however, that the Act itself must fall. [10] There is nothing to indicate that any part of this \$20,000 has ever been used or that its presence in the Act was the inducement to its passage. A statute solemnly enacted is not to be overthrown by anything short of positive conviction of its illegality, and it is not destroyed *in toto* because of an improper provision, unless such provision is necessary to the integrity

of the statute or was the inducement to its enactment. It is perfectly clear that this Act can be carried out without the unlawful provision, while it is pure speculation whether the loss of the unlawful appropriation will in the slightest degree affect its serviceability.

4. The last and final assault upon the Act is based upon the [11-13] provision exempting from taxation and recording fees the mortgages to be given pursuant to its terms. So far as the exemption from taxation is concerned, the Act creates no real distinction between these and other mortgages. Mortgages are not now taxed save as the notes, bonds or other choses in action secured by them are taxed; and it is so here. The bonds are to be taxed, and, because they are to be taxed, the mortgages are not.

It is not difficult to understand the theory upon which the exemption from recording fees was made. By the terms of the Act the mortgages are to run to the commissioner of farm loans, and the state may clearly exempt itself and its officers from paying such fees. It happens, however, that the commissioner of farm loans is only a nominal mortgagee, made so for convenience, the real mortgagees being the holders of the bonds secured by the mortgages. It is the contemplation of our law, whatever may be the commercial custom, that recording fees are to be paid by those whose interests are protected by recordation,—in case of mortgage the mortgagee. It is never legally a charge against the mortgagor, and exemption from it is not for his benefit. This exemption, therefore, furthers the interests neither of the farmer—the mortgagor—nor of the state; but, being for the sole benefit of the lender, the discrimination between him and all other mortgagees is not justified by any such relation to the encouragement of agriculture or any public purpose as would warrant the upholding of the exemption. It must be said again, however, that the Act itself is not involved in the condemnation of this provision, because it is not so interwoven with the texture of the Act, so indispensable to the purposes or operation of the Act as to

compel the view that without the provision the Act would not have been passed.

The bonds proposed to be issued, as shown by a form copy [14] attached to the complaint, contain various references to the \$20,000 appropriation as a guaranty fund; and it follows from the above discussion that they ought not, as a matter of fair dealing, to be issued in that form, because there is no such appropriation, legally speaking. Of this, however, the plaintiff cannot complain, since, whether these references remain in the bonds or not, they can have no force or effect prejudicial to him. Nor can he be affected by the invalid exemption from recording fees, because the several county recorders are responsible for their collection. He was therefore not entitled to the injunction sought, and the judgment appealed from was correct. It is accordingly affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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HONSTAIN, APPELLANT, v. BOARD OF COUNTY COMMISSIONERS OF RICHLAND COUNTY, RESPONDENT.

(No. 3,658.)

(Submitted May 11, 1916. Decided June 2, 1916.)

[158 Pac. 476.]

*Intoxicating Liquors—License—Renewal—Procedure—Burden of Proof—Transfer—Number of Saloons—Statutes.*

*Intoxicating Liquors—License—Transfer—Appeal—Moot Questions.*

1. Where, after an appeal from a judgment affirming a decision of the county commissioners refusing an application for the renewal of a liquor license, the county in question became subject to the local option statute, the appeal held to present only moot questions, inasmuch as a new trial, if error occurred, would not avail appellant.

*Same—Application for License—Contest—Nature of Proceeding—Parties.*

2. Upon a contested application for a retail liquor license, the proceedings are analogous to a trial, the applicant being the plaintiff, the

contestants the defendants, and the board of county commissioners the tribunal which hears the contest.

Same—Board of County Commissioners—Discretion—Burden of Proof.

3. Before the discretion of a board of county commissioners can be appealed to in the matter of an application for a retail liquor license, it must appear affirmatively that it has the power to act, the applicant having the burden of proof.

Same—License—Renewal—Refusal—Appeal—Trial *De Novo*.

4. On appeal to the district court from the decision of a board of county commissioners refusing an application for the renewal of a saloon license, the cause is tried *de novo*, and the relative situation of the parties is the same as before the commissioners, it being incumbent upon appellant to make out his *prima facie* right to a license before invoking the discretion of the court.

Same—License—Transfer—Statutes.

5. Though, under Chapter 35 of the Laws of 1913, a retail liquor license is negotiable and transferable within the county of its issuance, a purchaser of such a license entitling the holder to engage in the saloon business in the town of J. may not, by virtue of such license, undertake to carry on the same business in the town of F., in the same county, where the maximum number of saloons allowed by law was already being conducted.

[As to validity of statute, ordinance or order limiting the number of saloons in municipality, see note in *Ann. Cas.* 1913E, 365.]

*Appeal from District Court, Richland County; C. C. Hurley, Judge.*

APPLICATION by I. S. Honstain for the renewal of a saloon license. From a judgment of the district court affirming the decision of the county commissioners refusing the petition, the petitioner appeals. Affirmed.

Cause submitted on brief of Counsel for Appellant.

*Mr. R. O. Lunke and Mr. Henri J. Haskell*, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In November, 1913, a license to engage in the saloon business at Java was granted to John Steele. On the same day Steele assigned and transferred the license to I. S. Honstain, who employed it to engage in the saloon business at Fairview. When the license expired in June, 1914, Honstain applied for a renewal. A protest was presented, a hearing had, and the license

refused. Honstain appealed from the decision of the county commissioners, but the district court likewise refused his petition, and from the adverse judgment he appealed to this court.

After the appeal was perfected, Richland county, by a vote of [1] the electors, became subject to the local option statute, and it is now unlawful for anyone to engage in the retail liquor business in that county. This appeal, therefore, presents only moot questions, aside from the consideration of the subject of costs. If the trial court erred, we cannot order a license to issue in violation of the local option law, and a new trial would be unavailing to appellant. Our investigation of the merits will be limited to determining whether the judgment, in so far as it awards costs against the appellant, shall stand.

It is the rule in this state that upon a contested application [2] for retail liquor license the proceedings are analogous to a trial. The board of county commissioners is the tribunal which hears the contest; the applicant for the license is the plaintiff, and the protestants against its issuance are the defendants. (*State ex rel. More v. District Court*, 49 Mont. 577, 143 Pac. [3, 4] 1193.) Within the compass of its jurisdiction the board may exercise wide discretion, but its jurisdiction is limited, and before any appeal can be made to its discretion it must appear affirmatively that it has the power and authority to act, and the applicant for the license has the burden of proof. Upon appeal to the district court the Practice Act applicable to appeals from a justice court is invoked (sec. 3, Chap. 35, Laws 1913). The cause is tried *de novo*, and the relative situation of the contending parties is the same as before the commissioners. The burden was therefore upon the appellant to make out his *prima facie* right to a license, before any appeal to the court's discretion could be made, and in this respect he failed.

Section 1 of Chapter 35, above, limits the number of saloon licenses which may be issued to one license to every 500 [5] inhabitants of the city or town where the business is to be carried on, provided that in any city or town two licenses may be issued. The testimony before the trial court discloses

that at the date of appellant's application and the hearing before the board of commissioners Fairview was an unincorporated town. The number of its inhabitants is left altogether uncertain, but it cannot be contended that the record discloses that it had as many as 1,000. The only legitimate inference from appellant's own testimony is that it had much less than 1,000. Two saloons were engaged in business there then, and had been for some time, so that appellant failed to disclose any right to a third license. Section 2 of Chapter 35, above, however, is invoked to aid appellant's case. That section provides: "This Act, in so far as it limits the issuance of licenses for the sale, or the offering for sale, of spirituous, malt or fermented liquors, or wine, shall not affect any person, company or corporation now regularly licensed, nor the party to whom such license may be transferred, to sell, or offer for sale, any spirituous, malt or fermented liquors, or wine, or the reissuance or transfer of a license to such persons in accordance with existing laws upon this subject." It is true that under section 2759, Revised Codes, the license issued to Steele was negotiable and transferable within Richland county, but neither of these sections authorized appellant, a resident of Fairview with its maximum number of saloons already, to go out into another section of the county, purchase a license and under it operate a third saloon in Fairview in violation of section 1. Section 2 was only intended to protect licensees and their assignees in places having more retail liquor licenses in force than the maximum allowed under Chapter 35 at the time that Act went into effect.

It is unnecessary to consider appellant's contention that he was entitled to a jury trial. He failed to make out a *prima facie* case, and there was therefore nothing to be determined by a jury.

The judgment of the district court is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

HAUF, RESPONDENT, v. SCHOOL DISTRICT NO. 1 ET AL.,  
APPELLANTS.

(No. 3,663.)

(Submitted May 13, 1916. Decided June 3, 1916.)

[158 Pac. 315.]

*Real Property—School Districts—Equity—Quieting Title—Injunction—Conditional Deeds—Complaint—Sufficiency—Fixtures—Jurisdiction.*

Quieting Title—Injunction—Removal of School Building—Complaint—Sufficiency.

1. In a suit to quiet title to, and for an injunction against removing, a school building located on land deeded to defendant district, with the condition that when abandoned for school purposes it should revert back to the grantor, complaint which alleged that defendant, with intent to abandon the premises, ceased to use them for school purposes, quit them and allowed plaintiff to re-enter, and that the district had offered the building for sale, *held* sufficient, a technical abandonment not being necessary to plaintiff's suit.

Real Property—Fixtures—What Constitutes.

2. In the absence of anything showing an intention to the contrary, things affixed to realty—such as buildings resting upon foundations imbedded in the soil—are part of the realty and pass with it; hence ownership of such a structure necessarily followed ownership of the land rightfully decreed to plaintiff.

[As to what are fixtures, see notes in 14 Am. Dec. 303; 17 Am. Dec. 686; 24 Am. Dec. 726.]

Same—Quieting Title—Injunction—Equity—Jurisdiction.

3. The district court had jurisdiction, under its equity powers, of a suit of the character mentioned in paragraph 1, *supra*.

*Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.*

SUIT by J. E. Hauf, against School District No. 1 of Corvallis, Ravalli County, and others. From a decree for plaintiff, defendants appeal. Affirmed.

Mr. J. D. Taylor, for Appellants, submitted a brief and argued the cause orally.

Mr. E. C. Kurtz and Mr. R. A. O'Hara, for Respondent, submitted a brief; Mr. O'Hara argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The amended complaint in this case alleges: That on July 10, 1896, the plaintiff, who was then the owner and in possession of lot 3, in section 2, of township 6 north, range 21 west, Ravalli county, conveyed a portion thereof, to-wit, a tract 210 feet square, to school district No. 11 of said county; that such conveyance was by deed duly executed, running to the school district, its successors or assigns, and containing this clause: "Provided, however, that this deed is given with the express understanding that the said party of the second part shall use the said above-described property hereby conveyed for the purpose of erecting a public school building thereon and for maintaining and conducting a public school and such other public use as the directors may see fit and for no other purpose; the said above-described property to revert to the said parties of the first part whenever said school district shall use or attempt to use said property for any other purpose than that herein expressly agreed upon, or cease to use it for school purposes"; that the grantee entered upon the premises so conveyed, built and maintained a schoolhouse thereon and conducted school therein, said schoolhouse being a frame structure built upon a stone foundation imbedded in the soil; that in 1914 said school district No. 11, with intent to abandon the premises, permanently ceased to use the same for school or any purposes, whereupon, and in August, 1914, the plaintiff went into and has since been in possession of said premises and building; that school district No. 11 has consolidated and merged with defendant school district No. 1, which consolidated district maintains school elsewhere; that the defendant school district No. 1 and its trustees have advertised and offered said building for sale to the highest bidder, and have threatened to sell and move the same from said premises, and will do all this, unless restrained, to plaintiff's irreparable damage. The principal relief asked is a decree establishing plaintiff's ownership and right to the possession of the premises, including the building, and enjoining the defendants from selling or removing said building, or attempting so to do. The defend-



ants failed to answer. Their default was entered, and judgment followed. This appeal is from that judgment, the defendants contending that the complaint does not state any cause of action and does not support the judgment.

The supposed inadequacy of the complaint is based upon the [1] view that its allegations of abandonment are insufficient because: (a) They are mere conclusions; and (b) they are not directed to school district No. 1, which, by virtue of the consolidation alleged, became vested with the property. Assuming this to be so, the complaint is not therefore valueless. A technical abandonment is not necessary to the plaintiff's suit, and though the complaint is not a model of precision, its fair effect is to say that, with intent to abandon the premises, school district No. 11 ceased to use them for school or any purposes, quit them, allowed plaintiff to re-enter them, and that since its merger with school district No. 1 the premises have not been used for school purposes, but have been, and are, offered for sale by the consolidated district, acting through its trustees. We think this was sufficient to authorize whatever relief the plaintiff might be entitled to in virtue of the condition in the deed.

By the judgment the plaintiff is decreed to be the owner of [2] the premises, including the building, and the defendants, adjudged to have no further interest therein, were enjoined from in any manner interfering with the same. It is not seriously contended that the judgment was unjustified so far as it decreed plaintiff to be the owner of the land; but if this was correct, ownership of the building necessarily follows if the complaint sufficiently alleges that the building became part of the realty. We think it does so allege when it describes the building as a frame structure, constructed and built upon a stone foundation imbedded in the soil. "*Quicquid plantatur solo, solo cedit.*" In the absence of anything to show an intention to the contrary, things affixed to the realty, such as buildings permanently resting upon foundation imbedded in the soil, are part of the realty and pass with it. (Rev. Codes, secs. 4425, 4427; *Montana Elec-*

*tric Co. v. Northern Valley Min. Co.*, 51 Mont. 266, 153 Pac. 1017.)

The power of the court below sitting in equity to entertain [3] this suit is questioned, but without reason, in our opinion. (*Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10.)

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

BERKIN ET AL., RESPONDENTS, v. HEALY ET AL., APPELLANTS.

(No. 3,661.)

(Submitted May 12, 1916. Decided June 3, 1916.)

[158 Pac. 1020.]

*Mortgage Lien—Extinguishment—Statute of Limitations—  
Power of Sale—Quieting Title—Re-creation of Lien—Statutes  
—Constitution.*

**Mortgage Lien—Extinguishment—Statute of Limitations.**

1. While in the absence of legislation declaring a different rule the lien of a mortgage on real property is not extinguished by the lapse of the period fixed by the statute within which an action to enforce payment of the debt may be brought and prosecuted to a successful termination, such lien *held* to be so extinguished by section 5728, Revised Codes.

**Same—Re-creation—How not Effected.**

2. In view of section 5749, Revised Codes, providing that a mortgage of real property can be created, renewed or extended only by writing with the formalities required in the case of a grant of real property, a part payment by a mortgagor after the principal obligation was barred could not re-create the lien of the mortgage.

**Same—Quieting Title—Barred Mortgage.**

3. Notwithstanding a mortgage had ceased to be a lien upon the property, it was a cloud upon the title thereto, because it was ostensibly a mortgage valid on its face and required extrinsic evidence to demonstrate that it was in fact of no force.

[As to cloud on title and who may sue to remove, see note in 45 *Am. St. Rep.* 373.]

**Same—Mortgages—Power of Sale—Exercise—Extinguishment of Lien.**

4. Proceedings under a power of sale contained in a mortgage presuppose a valid mortgage lien upon the property originally mortgaged,

so that, where the lien of the mortgage had been extinguished as set forth in paragraph 1 above, the mortgagee could no longer exercise such power of sale.

**Same—Renewal.**

5. Though the legislature has the power to so change the statute as to revive the right of action on a barred debt, such revival cannot, against the property owner's consent, re-create a mortgage lien which was extinguished by failure to bring action upon the debt within the period fixed by statute.

**Same—Renewal Against Owner's Consent—Statutes—Constitution.**

6. If by Chapter 27, Laws of 1913, it was intended to enable a mortgagee whose mortgage had been extinguished by lapse of time, to re-vitalize the security and impose a lien upon property without the owner's consent, it to that extent deprives him of his property without due process of law, and is invalid.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by T. A. Berkin and another against Tena De Witt Healy and others. Decree for plaintiffs, and defendants appeal. Affirmed.

*Messrs. Wight & Pew*, for Appellants, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

A mortgagor cannot have a mortgage canceled as a cloud upon his title on the sole ground that it is outlawed, nor can his successor in interest have such relief. Nothing less than payment of the debt will entitle either of them to have the record cleared. (*Tracy v. Wheeler*, 15 N. D. 248, 6 L. R. A. (n. s.) 516, 107 N. W. 68; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. 74; *Burns v. Hiatt*, 149 Cal. 617, 117 Am. St. Rep. 157, 87 Pac. 196; *Merriam v. Goodlett*, 36 Neb. 384, 54 N. W. 686.) The principle of these cases is very forcibly discussed by Chief Justice Cullen in *House v. Carr*, 185 N. Y. 453, 113 Am. St. Rep. 936, 7 Ann. Cas. 185, 6 L. R. A. (n. s.) 510, 78 N. E. 171.

Under the facts in this case, the respondents occupy no better position than Miller, the original mortgagor. Even if an action to foreclose the mortgage in court were barred, it will be observed that the mortgage contains a power of sale. This court has held that such a power of sale is valid. (*First Nat. Bank v. Bell S. & C. Min. Co.*, 8 Mont. 32, 19 Pac. 403; *Muth v. Goddard*,

28 Mont. 237, 98 Am. St. Rep. 553, 72 Pac. 621.) The statutes of limitation apply only to actions in court, and do not apply to foreclosures under a power of sale. (*House v. Carr*, 185 N. Y. 453, 113 Am. St. Rep. 936, 7 Ann. Cas. 185, 6 L. R. A. (n. s.) 510, 78 N. E. 171.)

Chapter 27 of the Laws of 1913 provides for the renewal of a real estate mortgage by the filing of an affidavit containing certain matters. The court below apparently held the Act of 1913 unconstitutional; otherwise the demurrer to the answer could not have been sustained. The Act is valid and the affidavit of renewal gave the mortgage full vitality for the purpose of a foreclosure in this case. (See *House v. Carr*, *supra*; *Orman v. Van Arsdell*, 12 N. M. 344, 67 L. R. A. 438, 78 Pac. 48; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446; *Hulbert v. Clark*, 128 N. Y. 295, 14 L. R. A. 59, 28 N. E. 638.)

*Mr. E. K. Cheadle*, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In the complaint in this action it is alleged that on November 6, 1885, David C. Miller executed and delivered to C. A. De Witt his promissory note and a mortgage upon 160 acres of land to secure the payment; that the mortgage was duly recorded and ever since has remained of record and uncanceled; that the indebtedness has never been paid in whole or in part; that the right to recover it is barred by statutes of limitation, the appropriate sections of which are cited; and that the lien of the mortgage has been extinguished. It is further alleged that the plaintiffs are the present owners of the land; that the defendants are the heirs and successors of De Witt; that in July, 1913, defendants executed and filed for record an affidavit purporting to extend or renew the mortgage of 1885; that the affidavit was made and filed without the consent of plaintiffs;

and that the mortgage and this affidavit constitute clouds upon plaintiff's title and should be canceled.

The answer admits substantially all of the allegations of the complaint and, by way of equitable counterclaim, repeats the history of the mortgage transaction, and alleges that in 1906 Miller, the original mortgagor, then the owner of the land, commenced an action to have the mortgage canceled, and that his complaint constituted such an acknowledgment as operated to take the case out of the statute of limitations. The prayer is that the mortgage be decreed to be a valid lien upon the land and that it be foreclosed. There is an allegation that a payment of \$100 was made by Miller in 1896. To this counterclaim plaintiffs interpose a general demurrer which was sustained, and, defendants failing to plead further, a decree conforming to the prayer of the complaint was rendered and entered, and from that decree this appeal is prosecuted.

It may be conceded at once that, in the absence of a statute [1] declaring a different rule, the lien of a mortgage is not extinguished by the mere lapse of the period fixed by the statute within which an action to enforce the payment of the debt may be brought and prosecuted to a successful termination. This rule was declared by the courts of New York (*Pratt v. Huggins*, 29 Barb. (N. Y.) 277; *Waltermire v. Westover*, 14 N. Y. 16), and was incorporated in the proposed Civil Code prepared by David Dudley Field and his associates for the state of New York (sec. 1605). That proposed Code was adopted, almost in its entirety, by California; but the legislature, for reasons satisfactory to itself, changed the language of section 1605 to read: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." (Sec. 2911, Cal. Civ. Code.) In *Mutual Life Ins. Co. v. Pacific Fruit Co.*, 142 Cal. 477, 76 Pac. 67, the California court refers to this bit of legislative history as follows: "It should be remarked that section 2911 was designedly passed to change the former rule respecting the continued existence of a lien after the statute of

limitations has barred the remedy upon the principal obligation. Thus the proposed Civil Code of New York (the Field Code), from which admittedly so many of the provisions of our own Code have been taken, provided (section 1605), in accordance with the common rule: 'A lien is not extinguished by the mere lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.' Our own codifiers industriously changed this language, and declared that a lien is extinguished by such lapse of time. We have thus adopted a rule contrary to that existing at the common law (*Taunton v. Goforth*, 6 Dowl. & R. 384), and contrary, therefore, to the authorities of those states where the common-law rule has not been abrogated by express statute."

In 1895 we adopted our Civil Code from California (Report of Code Commissioners, p. 13), and with the knowledge that the change noted above had been made, our legislature followed the California lawmakers and incorporated section 2911, above, without change as section 3792 of our Civil Code, and this was brought forward and re-enacted as section 5728, Revised Codes of 1907, and made directly applicable to mortgages, by section 3735, Civil Code (sec. 5709, Rev. Codes). When our Civil Code became effective, July 1, 1895, the Miller note was then barred by the statute of limitations, and, by virtue of section 3792, above, the lien of the mortgage was altogether extinguished and the mortgage itself stripped of its vitality. (*Henderson v. Grammar*, 66 Cal. 332, 5 Pac. 488; *San Jose Safe Deposit Bank v. Bank of Madera*, 144 Cal. 574, 78 Pac. 5; *Vandall v. Teague*, 142 Cal. 471, 76 Pac. 35.)

The payment of \$100 made by Miller in 1896, after the [2] principal obligation was barred, though it may have operated to create a new obligation binding *in foro conscientiae*, notwithstanding the statute, could not re-create the lien of the mortgage which was already fully extinguished, for "a mortgage of real property can be created, renewed or extended only by writing with the formalities required in the case of a grant of

real property." (Sec. 3842, Civil Code; sec. 5749, Rev. Codes; *Wells v. Harter*, 56 Cal. 342.) The payment of \$100 in 1896 was in reality without any practical effect, for it is conceded that no payment was thereafter made and nothing was done to prevent the running of the statute for more than eight years.

But notwithstanding this mortgage ceased to be a lien upon [3] the property twenty years ago or more, it is a cloud upon plaintiff's title, because it is ostensibly a mortgage valid upon its face and requires extrinsic evidence to demonstrate that it is in point of fact of no force or validity. (7 Cyc. 255.) If the principal obligation had been kept alive constantly by payments or otherwise, the lien of the mortgage would have continued. It requires extrinsic evidence to disclose that the debt is barred and the lien therefore extinguished.

Counsel for appellants insist that the complaint filed by Miller in 1906 constituted such an acknowledgment of the debt, within the meaning of section 6472, Revised Codes, as to take it without the statute. If the inquiry were a material one, we should doubt the soundness of counsel's position (*Braithwaite v. Harvey*, 14 Mont. 208, 43 Am. St. Rep. 625, 27 L. R. A. 101, 36 Pac. 38); but it is not, for, as we have observed before, the reinstatement of the debt in 1906 could not vitalize the mortgage which was extinguished in 1895.

It may be conceded that as a general rule a court of equity will not cancel a mortgage of record at the suit of the mortgagor or his privies, merely because the principal obligation is barred by the statute of limitations. In many jurisdictions the lien of the mortgage continues notwithstanding the debt is barred, and under such circumstances a court of equity would invoke the maxim, "He who seeks equity must do equity," "He who seeks cancellation of the lien must pay the debt." But in this state, where the lien of the mortgage is entirely extinguished as soon as the debt is barred and the mortgagee cannot thereafter assert any claim or interest by virtue of the mortgage, the right of action does not depend upon the bare fact that the debt is barred, but upon the fact that the mortgage has ceased

to be of any force or validity; that its cancellation will not deprive the mortgagee of any right; and that the policy of unrestricted devolution of property, which must have prompted the enactment of section 5728, above, is promoted by clearing the record of a cloud which obstructs the plaintiffs in the exercise of their right of ownership.

Plaintiffs do not ask that the mortgage debt be canceled. For aught that appears here, defendants may, in an action upon the Miller note, recover a personal judgment against the maker (*Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; *Mechanics' Building & Loan Assn. v. King*, 83 Cal. 440, 23 Pac. 376); but they cannot benefit from the mortgage and cannot complain that the court below canceled an instrument in which they have no interest. It cannot be inequitable to seek relief which injures no one.

Neither can these defendants exercise the power of sale contained in the mortgage. Proceedings under the power of sale [4] constitute but a shorthand method of foreclosure and presuppose a valid mortgage lien upon the property originally mortgaged. (*First Nat. Bank v. Bell S. & C. Min. Co.*, 8 Mont. 32, 19 Pac. 403.) When the mortgage ceases to be a lien, it ceases to be a mortgage.

A debt is not paid by the running of the statute of limitations. [5] The statute affects the remedy, and it is clearly within the power of the legislature to so change the statute as to revive the right of action upon a debt long since barred (*Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483, 6 Sup. Ct. Rep. 209), but the revival of the right of action upon the debt cannot re-create a lien upon one's property without his consent.

Chapter 27 of the Laws of 1913, which provides a method for renewing mortgages upon real property, is doubtless valid so far [6] as its provisions operate prospectively; but if it were intended to enable a mortgagee, whose mortgage had ceased to be such, to revitalize his security and impose a lien upon property without the owner's consent, to that extent it deprives the owner of his property without due process of law and is invalid. The



proviso attached to section 1 of Chapter 27, above, must have been enacted in ignorance or utter disregard of section 5728, Revised Codes, and the effect which its provisions had upon mortgages securing debts then already barred.

The affidavit filed by these defendants in 1913 did not re-establish the Miller mortgage as a lien upon plaintiffs' property, but for the reasons indicated above it casts a cloud upon their title. The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied July 8, 1916.

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PASCOE, RESPONDENT, v. NELSON ET AL., APPELLANTS.

(No. 3,665.)

(Submitted May 13, 1916. Decided June 5, 1916.)

[158 Pac. 317.]

*Personal Injuries—Master and Servant—Rules—Release—New Trial—Misconduct of Counsel.*

Personal Injuries—Master and Servant—What is not Contributory Negligence.

1. Where plaintiff was ordered on a freight elevator by his foreman and vice-principal of his employer, and in obeying the command was injured, in the absence of evidence that the danger was apparent and so great that no reasonably prudent man would venture into it, he was not guilty of contributory negligence.

Same—Rules—Notice to Servant.

2. If plaintiff did not know of a rule of his employers warning employees not to ride on a freight elevator, he could not be bound by it; the mere publishing of a rule without insisting upon its observance being insufficient to discharge defendants' obligation in this respect.

[As to warning and instructions to servants engaged in dangerous work, see notes in 1 Am. St. Rep. 28; 1 Am. St. Rep. 548.]

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For authorities passing on the question of contributory negligence in disobeying rule in obedience to orders of superior, see note in 8 L. R. A. (n. s.) 90. And as to whether or not a servant is bound by rules not known to him, see note in 43 L. R. A. 365.

**Same—Release—Question for Jury.**

3. Whether payment by the employers of the plaintiff's doctor bills and his regular wages for the time he was incapacitated immediately after his injury was made and accepted as settlement and discharge of any claim which he had for damages arising from his injury, held for the jury under the conflicting evidence on the subject.

**Appeal and Error—Motion for New Trial—Province of Court—Affidavits—Determination of Facts.**

4. Where affidavits were submitted on motion for new trial alleging improper statements of plaintiff's counsel, and counter-affidavits filed putting the allegations in issue, it was the province of the trial court to determine the facts from the conflicting affidavits.

**New Trial—Misconduct of Counsel—Duty of Appellant.**

5. Where appellants failed to ask the court at the trial to admonish the jury as to alleged improper remarks made by plaintiff's counsel, their motion for new trial on that ground will not be granted.

**Personal Injuries—Indemnity Against—Misconduct of Counsel.**

6. Where defendants voluntarily made known to the jury that their liability for injuries to their employees was insured against in an indemnity company, plaintiff's counsel cannot be said to have been guilty of misconduct in commenting upon, and making any legitimate deductions from, such evidence.

***Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.***

**ACTION** by Arthur Pascoe against George Nelson and Hans Pederson, copartners, doing business as Nelson & Pederson, and another. Judgment for plaintiff and defendants appeal from it and an order denying them a new trial. Affirmed.

*Mr. Jesse B. Roote and Mr. H. C. Hopkins*, for Appellants, submitted a brief; *Mr. Hopkins* argued the cause orally.

By the evidence the plaintiff had shown *prima facie* that he was guilty of contributory negligence; and when plaintiff's own case in an action for damages on account of personal injuries presents evidence which shows this, he cannot recover, unless further evidence be produced exculpating him. (*Harrington v. Butte, A. & P. Ry. Co.*, 37 Mont. 169, 16 L. R. A. (n. s.) 395, 95 Pac. 8; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Lynes v. Northern Pacific R. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81; *Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131; *Prosser v. Montana Cent. Ry. Co.*, 17 Mont. 372, 376, 30 L. R. A. 814, 43 Pac. 81; *Meehan v. Great Northern R. Co.*, 43 Mont. 72, 80, 114 Pac. 781.)

Where the danger is obvious, imminent or well known to the servant, there can be no recovery from the master where the servant is injured. (*Davis v. Western Ry.*, 107 Ala. 626, 18 South. 173; *Coosa Mfg. Co. v. Williams*, 133 Ala. 606, 32 South. 232; *Last Chance Min. etc. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382; *Duval v. Hunt*, 34 Fla. 85, 15 South. 876; *Roul v. East Tennessee etc. Ry. Co.*, 85 Ga. 197, 11 S. E. 558; *Bradshaw's Admr. v. Louisville etc. R. Co.*, 14 Ky. Law Rep. 688, 21 S. W. 346; *Kean v. Detroit Copper etc. Co.*, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; *Smith v. St. Paul etc. R. Co.*, 51 Minn. 86, 52 N. W. 1068; *Jones v. Galveston etc. Ry. Co.*, 11 Tex. Civ. 39, 31 S. W. 706; *Writt v. Girard Lumber Co.*, 91 Wis. 496, 65 N. W. 173.)

In the trial of an action for injury to a servant, it is improper for plaintiff's attorney to state in the presence of a jury that defendants are insured in an employers' liability company. (*Lassig v. Barsky*, 87 N. Y. Supp. 425; *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861; *Coselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494.)

*Mr. Harry Meyer*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In an action for damages for personal injuries, plaintiff recovered a judgment for \$250, and defendants appealed. It is insisted that plaintiff's own testimony discloses contributory negligence on his part in riding upon a freight elevator in violation of a rule promulgated by his employers. The plaintiff [1] testified that he was ordered on the elevator by the foreman and vice-principal of his employers, and, assuming that the jury accepted this statement as true, then, in the absence of any showing that the danger was apparent and so great that no reasonably prudent man would venture into it, the doctrine announced in *Titus v. Anaconda C. M. Co.*, 47 Mont. 583, 133 Pac.

677, is applicable here, *viz.*: "If the master orders the servant into a situation of danger, and in obeying the command he is injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him."

Whether the employees were warned not to ride upon the [2] elevator, and whether, if the employers adopted the rule relied upon by them, they exercised reasonable care to enforce it, are questions upon which the evidence is contradictory. If the plaintiff knew nothing of the inhibition, he could not be bound by it; and the defendants did not discharge their obligation merely by publishing a rule and then permitting it to be honored only in the breach until it became a dead letter. (*O'Brien v. Corra-Rock Island M. Co.*, 40 Mont. 212, 105 Pac. 724.)

The evidence is uncontradicted that defendants paid plaintiff's doctor bill and his regular wages for the time he was incapacitated immediately after his injury, but whether there was any understanding or agreement that these benefits were conferred on the one hand, and accepted on the other, as a settlement and discharge of any claim which plaintiff had for damages arising from his injury, was properly submitted to the jury for determination from the conflicting evidence upon the subject.

"Insufficiency of the evidence to justify the verdict" and "the verdict is against law" are specifications contained in appellants' brief, but not argued further than to again direct our attention to the evidence which appellants insist discloses contributory negligence and a settlement and satisfaction of the claim sued upon.

The principal contention made in the lower court, and here, is that the defendants were prejudiced by remarks made to the jury by counsel for plaintiff in his closing argument. Affidavits [4] were presented by defendants from which it appears that plaintiff's attorney in an attempted explanation of the fact

that he had not called as a witness either of the physicians who attended the plaintiff said, in substance, that defendant Nelson had "seen the doctors first," and had wrongfully induced them not to testify; that Nelson & Pederson had more money than the plaintiff; that the jurors by their verdict should make the plaintiff a Christmas present; and, finally, that the attorney repeatedly impressed upon the jury the fact that the liability of the defendants, Nelson & Pederson, was insured by an indemnity company, which company was really the party defending and the one ultimately liable for any judgment which plaintiff might recover. Counter-affidavits were presented which put in issue all the material allegations concerning the statements made by counsel, except the reference to the indemnity insurance. It was the province of the trial court to determine the facts from the conflicting affidavits. (*Beller v. Le Boeuf*, 50 Mont. 192, 145 Pac. 945; *Middlefork Cattle Co. v. Todd*, 49 Mont. 259, 141 Pac. 641.) The same judge who tried the cause and heard the argument, who was appealed to by defendants and who admonished plaintiff's counsel, denied a new trial, for the reason that the defendants had not requested the court to instruct the jury to disregard counsel's remarks. To what extent, if at all, the trial court found the charges made against plaintiff's counsel to be true, we are unable to determine. The burden was upon the moving party, the defendants, and we cannot say from the printed record that they sustained it. Assuming, however, that [5] counsel made the remarks attributed to him, a proper admonition to the jury to disregard them ought to have been sufficient. So long as the jury system is in vogue courts must assume that jurors possess sufficient intelligence and force of character to discharge their duty when properly directed. Appellants failed to ask the trial court to admonish the jury, and for that reason the order denying their motion for a new trial should be affirmed.

Appellants' criticism of the argument in so far as it related [6] to the insurance is entirely devoid of merit. In the direct examination of the defendant Nelson he voluntarily made known

to the jury the fact that the liability of himself and his codefendant Pederson for injuries caused to their employees was insured in an indemnity company, and defendants cannot now be heard to say that plaintiff's counsel was guilty of misconduct in commenting upon and making any legitimate deductions from the evidence which was produced by themselves.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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LARKIN, APPELLANT, v. CITY OF BUTTE ET AL.,  
RESPONDENTS.

(No. 3,666.)

(Submitted May 15, 1916. Decided June 5, 1916.)

[158 Pac. 316.]

*Injunction—Cities and Towns—Police Officers—Complaint—Insufficiency—Metropolitan Police Law—Powers.*

Cities and Towns—Injunction—Police Officers—Physical Examination—Complaint—Insufficiency.

1. The complaint of a city taxpayer which omitted to show that he was a police officer, or that he would suffer a special injury by a resolution of the council authorizing the appointment of a commission to make a physical examination of the members of the police force for the purpose of ascertaining whether any one of them had, by reason of old age or disease, become permanently incapacitated to discharge the duties of his office, was, under section 6643, Revised Codes, insufficient as a basis for an injunction to restrain the examination or the incurring of the expense incident to it.

Same—Metropolitan Police Law—Powers.

2. Under section 3314, Revised Codes, the city council may furnish assistance to the mayor, in the form of a commission, to determine the physical competency of the members of the police force.

Same—Unauthorized Expenditures—Complaint—Insufficiency.

3. A complaint against a city alleging an unauthorized purchase of apparatus was insufficient to warrant an injunction in the absence of an averment that a claim in payment thereof had been presented to and allowed by the council.

[As to power of body having power to remove public officer to appoint committee to conduct hearing, see note in *Ann. Cas.* 1916C, 1273.]

*Appeal from Second Judicial District Court, Silver Bow County; John B. McClearn, Judge.*

INJUNCTION by James P. Larkin against the City of Butte and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

*Messrs. W. E. Carroll, J. E. Healey and H. L. Maury, for Appellant.*

*Messrs. J. V. Dwyer, John A. Groeneveld and N. A. Rotering, for Respondents.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In June, 1914, the city of Butte by resolution of its council created a commission to examine all members of the police force and to report to the mayor the name of any member who, by reason of age or disease, had become permanently incapacitated to discharge the duties of his office. Section 5 fixes the compensation of the commissioners and provides further: "And said commission, with the consent of the mayor, may incur any and all expenses necessary to carry out the provisions of this resolution and to make the examinations as thorough as such commission may deem necessary." This suit, by a resident taxpayer, was instituted to restrain the city officers and the members of the commission from carrying the resolution into effect, or appropriating or expending any public money under its provisions.

After certain preliminary allegations, the complaint charges that it is the intent of the resolution that the expenses incurred by the commission for apparatus shall be paid by the city from its general fund "without restriction as to necessity, amount, value, efficiency, or subsequent utility to said city"; that one of the commissioners, without previous advertisement therefor

or the letting of any contract, has purchased apparatus for which the city intends to pay more than \$250; and that the tests proposed to be applied to members of the police force are oppressive and invade the private rights of the policemen. A copy of the resolution is attached to and made a part of the pleading. A general demurrer to the complaint was sustained, and from a judgment dismissing the action plaintiff appealed.

To determine whether the complaint states a cause of action, [1] its allegations must be read in connection with the provisions of the resolution. So far as the complaint charges that the tests to be applied by the commission will invade private rights of the members of the police force is concerned, it is sufficient to say that the plaintiff does not allege that he is a member of the force or that he, as a taxpayer, will be injured as a result of the tests. Whatever rights, if any, members of the police force may have when the tests are applied or sought to be applied, they are not of such character that this plaintiff, by virtue of his being a taxpayer, can invoke them. He does not disclose that special injury to himself, which is essential to entitle him to an injunction. (Rev. Codes, sec. 6643; 22 Cyc. 893.)

The city of Butte is a city of the first class, and is operating its police department under the Metropolitan Police Law (secs. 3304-3317, Rev. Codes). Section 3306 provides that members once appointed after their probationary service, shall hold office "during good behavior, or until by age or disease they become permanently incapacitated to discharge their duties." Section 3308 provides that no member or officer of the police force in a city of the first class shall be discharged without a hearing or trial before the examining and trial board. Section 3309 provides for charges against a police officer and for the trial and determination thereof. Section 3314 provides: "[2] the provisions herein contained, the city or town council may make any ordinances, not inconsistent with this Act, or any law of the state, for the government of the police department, and for regulating the powers and duties of its officers and members." By section 3305 supervision of the police force



is confided to the mayor. It is his duty to know that the members of the force are physically able to perform the services rightfully required of them, and it is equally his duty to prefer charges of incompetency against any member who by reason of age or disease is permanently incapacitated. Before making such charge, he should have some reasonable ground therefor, and if in the judgment of the council it is necessary or expedient that the mayor have assistance in determining the physical competency of the members of the force, section 3314 furnishes ample authority for a proper provision for such help.

If we assume that, by the provision of the resolution quoted above, there is an unwarranted delegation of power to the commission, this complaint is not cured, for sections 3283 and 3287, [3] Revised Codes, require that all accounts against the city must be presented to and approved by the city council before payment can be authorized, and this complaint does not contain any allegation that any bill for the apparatus ordered by one member of the commission has been presented to or allowed by the council. We cannot assume that the council will approve a claim contracted in violation of law, and unless such claim is approved, it cannot be paid, and plaintiff cannot be injured.

Apparently this action was brought prematurely; but in any event we think the complaint insufficient to warrant the relief sought.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**CASES DETERMINED**  
**IN THE**  
**SUPREME COURT**

**AT THE**  
**JUNE TERM, 1916.**

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**THE HON. THEODORE BRANTLY, Chief Justice.**

**THE HON. SYDNEY SANNER,**  
**THE HON. WILLIAM L. HOLLOWAY,** } **Associate Justices.**

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**GLENN, APPELLANT, v. S. BIRCH & SONS CONSTRUCTION**  
**CO., RESPONDENT.**

(No. 3,669.)

(Submitted May 16, 1916. Decided June 7, 1916.)

[158 Pac. 834.]

***Contracts—Sales—Offer and Acceptance—Counter Proposals—***  
***Effect.***

**Contracts—Offer and Acceptance.**

1. In order to form a contract, there must be an offer by one party and an unconditional acceptance of it by the other in accordance with its terms, and, if the acceptance falls within or goes beyond the terms of the offer, there is no contract.

**Same—Sales—Offer—Unconditional Acceptance Necessary.**

2. Acceptance of an offer of sale of city bonds,—the negotiations being conducted through the medium of correspondence by telegrams and letters,—to which was attached a reservation, giving the buyer the right to examine the legality of the proceedings of the city council leading up to the issuance of the bonds before concluding the purchase, was not unconditional and absolute so as to bind the seller.

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For authorities on the question of time and place of consummation of contract when offer is by letter and acceptance by telegram, or *vice versa*, see notes in 6 L. R. A. (n. s.) 1016 and L. R. A. 1916A, 1302.

Same—Sales—Buyer Substituting Third Person—Effect.

3. Where an offer for the sale of city bonds has been made by the seller to A, the latter could not, by coupling with his acceptance a proposal that B should be substituted in his place as buyer, compel the seller to enter into contract relations with B, a stranger about whom he knew nothing, and the seller could rightfully withdraw his offer without incurring liability to A notwithstanding the latter then—but too late—proposed to assume the position of obligee and accept delivery of the bonds.

[As to contracts by telegraph and the admissibility of telegrams as evidence, see notes in 93 Am. Dec. 514; 110 Am. St. Rep. 742.]

Same—Confirmation of Sale—"Subject to Written Contract."

4. Where a buyer of municipal bonds indicated in a telegram that he desired to enter into a written contract of sale, the seller's reply that he confirmed the sale "subject to written contract," construed as a reservation of the right to reject the formal writing if examination of it disclosed unacceptable terms.

*Appeal from District Court, Cascade County; H. H. Ewing, Judge.*

Action by Fred Glenn against the S. Birch & Sons Construction Company. Judgment for defendant and plaintiff appeals. Affirmed.

*Messrs. Cooper & Stephenson*, for Appellant, submitted a brief.

*Mr. J. W. Speer*, for Respondent, submitted a brief; *Mr. J. A. Kaufman*, of Counsel, argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for breach of contract. The district court having sustained a general demurrer to the complaint and rendered judgment for defendant, the plaintiff appealed. The question presented is whether certain correspondence between the parties by telegrams and letters resulted in the formation of a contract.

Some time during the year 1913, and prior to the month of October, the defendant corporation had contracted with the city of Great Falls to construct pavements in two improvement districts designated as districts 157 and 158, the city agreeing to pay for construction done in the first the sum of \$143,166.28,

and in the latter the sum of \$54,462. Payment was to be made in bonds due in eight annual installments, with interest at 6 per cent per annum. They were to be delivered to defendant from time to time in installments, as the work progressed. The plaintiff, doing business in Portland, Oregon, as Fred Glenn & Co., desiring to purchase the bonds from defendant, had the following correspondence with it:

Telegram from plaintiff to defendant:

"Portland, Oregon, September 26, 1913.

"Messrs. Birch & Sons, Contractors, Great Falls, Montana.

"Please wire immediately stating whether you have any desirable issues of coupon warrants which you desire to sell at ninety-four. State amount and names of streets covered by the improvements.

"FRED GLENN & COMPANY."

Telegram from defendant to plaintiff:

"Great Falls, Mont., Sep. 27, 1913.

"Fred Glenn and Company, Portland, Oregon.

"We have two hundred thousand six per cent coupon bonds eight years for ninety-seven.

"S. BIRCH AND SONS CONSTN. CO."

Reply to foregoing:

"Portland, Oregon, Sept. 28th, 1913.

"S. Birch & Sons Construction Co., Great Falls, Montana.

"Please mail immediately map showing districts covered by bonds mentioned your wire. If more than one district please state number each district amount warrants each district whether total issues are available denominations of bonds assessed valuation of each district also estimated sale value per front foot cost of improvements per foot. Can possibly use total issue providing showing is satisfactory.

"FRED GLENN & COMPANY."

On September 29, defendant wrote to plaintiff giving in detail the information called for in the telegram of September 28. In that letter the defendant wrote as follows:

"We herewith confirm our telegraphic quotation of 97 cents for these warrants, and are holding the same subject to disposal to other parties at our convenience."

Telegram from plaintiff to defendant:

"Portland, Oregon, October 1, 1913.

"Messrs. Birch & Sons, Contractors, Great Falls, Montana.

"Glenn will arrive Great Falls Thursday evening train purpose inspection district.

"FRED GLENN & COMPANY."

Telegram from defendant to plaintiff:

"Great Falls, Montana, October 8, 1913.

"We will hold Great Falls warrants for your acceptance until October eleventh. After that date will hold them subject to disposal to other parties.

"S. BIRCH & SONS CONSTN. CO."

Telegram from defendant to plaintiff:

"Great Falls, Montana, October 8, 1913.

"Fred Glenn, Bond A, Dept. German American Trust Co., Denver, Colo.

"We confirm our figures of ninety-seven on bonds mentioned advise at once by wire what proceedings etc. you require.

"S. BIRCH & SONS."

Telegram from plaintiff to defendant:

"Denver, Colorado, October 8, 1913.

"Birch & Sons, Contractors, Rainbow Hotel, Great Falls, Montana.

"Our people have confirmed purchase both districts Great Falls, Montana, paving warrants, subject legality, etc. We are sending written contract which you will please sign. Concerning proceedings please obtain minutes every council action from start to finish. We are writing you fully. Please wire underigned immediately confirming sale. Use Denver address.

"FRED GLENN."

Reply to this telegram:

"Great Falls, Mont. Oct. 8, 1913.

"Fred Glenn, Bond Dept. German American Trust Co., Denver, Colo.

"We confirm sale of warrants subject to written contract.

"S. BIRCH & SONS CONSTN. Co."

The plaintiff wrote to defendant at length from Denver, Colorado, on October 9, 1913. In this letter, after recapitulating in substance the correspondence had between the parties up to that time, the plaintiff wrote as follows:

"In connection with this matter, we desire to state that these bonds have been sold to the German American Trust Company of this city. \* \* \* You will note, from consulting the inclosed statement, that this bank is perfectly reliable, and will take care of these warrants as they are delivered, in accordance with the writer's interview with your Mr. Fred Birch. \* \* \* The trust company will doubtless send two of their directors to look at the district, and these directors will probably desire you to conduct them over the same. In doing so the question of price paid for these warrants might possibly arise, and we will greatly appreciate having you keep the figures, at which we purchased them from you, a matter of confidence between ourselves. If there are any other members of the firm who know about this price, and who may come in contact with these directors, kindly advise them on this matter, as we do not desire to have them know exactly what our commission will be. The inclosed written contract you will please execute in triplicate, keeping one copy for yourselves and sending the other two copies to us, addressed Yeon Building, Portland, Oregon. Kindly give this latter matter your prompt attention, so that the contract will be in Portland by the time the writer arrives there the first part of next week."

Telegram from defendant to plaintiff:

"Great Falls, Mont., Oct. 15, 1913.

"Fred Glenn Co., Yeon Bldg., Portland Ore.

"Contract for bonds not satisfactory. Do not care to contract to deliver bonds to third party and herewith withdraw our offer.

"S. BIRCH AND SONS,

"S. BIRCH,

"President."

Reply to this telegram:

"Portland, Oregon, October 16, 1913.

"S. Birch and Sons, Contractors, Great Falls, Montana.

"We have already received your definite telegraphic acceptance of our offer to purchase all your Great Falls Montana paving bonds. It is now too late to withdraw your acceptance. Delivery can be made direct to us. Contract can be satisfactorily adjusted. We insist on delivery as per your telegraphic acceptance to our Mister Glenn in Denver Wire answer.

"FRED GLENN & COMPANY."

Defendant's reply to above:

"Great Falls, Montana, October 16, 1913.

"Fred Glenn and Co., Portland, Ore.

"We absolutely refuse to consider your contract on Great Falls paving bonds. It is too late to adjust it to suit us.

"S. BIRCH AND SONS CONSTN. Co.,

"S. BIRCH, Pres."

The complaint does not disclose the terms of the contract which the plaintiff desired the defendant to enter into with the German American Trust Company.

The propriety of the court's action in sustaining the demurrer turns upon the inquiry what import must be given to the second telegram sent by plaintiff from Denver, Colorado, on October 8. The telegram of the same date from defendant cannot be regarded as anything other than a formal offer of sale with an implied request, in case of acceptance of the offer, for information as to what, if any, of the proceedings touching the organization of the improvement district, and those touching the issu-

ance of the bonds, the plaintiff would require. This is made manifest by the fact that up to that time the plaintiff had not accepted defendant's offer. Regarding this telegram as an unconditional offer at the price named, the question then is whether the telegram of that date from the plaintiff constituted an unconditional acceptance.

In order to form a contract there must be an offer by one party and an unconditional acceptance of it by the other, in accordance with its terms. The offer must be in a form in which [1] it may be accepted, and the acceptance must be absolute and unconditional, according to its terms, of everything which the offer requires to be accomplished. In other words, there must be an entire agreement in the minds of the parties, not only as to the subject matter, but also as to the extent and character of the obligation with reference to it assumed by each. If the acceptance falls within or goes beyond the terms of the offer, there is no agreement of minds, and the transaction amounts to nothing more than one of proposals and counter proposals. (*Brophy v. Idaho P. & P. Co.*, 31 Mont. 279, 78 Pac. 493; *Monahan v. Allen*, 47 Mont. 75, 130 Pac. 768; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Minneapolis etc. Ry. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 30 L. Ed. 376, 7 Sup. Ct. Rep. 168.) Let us see if plaintiff's telegram meets this requirement. If it had in- [2, 3] cluded merely the words, "our people have confirmed the purchase both district Great Falls, Montana, paving warrants," there would have been no question that the acceptance would have been sufficient. Not being willing to become absolutely bound, however, plaintiff, besides attaching a condition reserving to himself the right to determine the legality of the bonds after an examination of the proceedings leading up to their issuance, furthermore, as appears from the telegram and the letter of October 9, proposed that defendant should enter into a written contract with a third party, the German American Trust Company, thus substituting the company in place of himself. The acceptance was, therefore, not unconditional and absolute, but conditional in the first instance, and carried with it



a counter proposal which had not theretofore been considered. Suppose, upon subjecting the proceedings to examination, the plaintiff had found them irregular in particulars which, in his opinion, rendered the validity of the bonds questionable; would plaintiff have nevertheless been bound to take the bonds and pay for them?

But, waiving this question, was defendant bound to enter into contract relations with a person other than the plaintiff? Its proposition was to sell to plaintiff, not to another person. The negotiations had been made with him. It had had an opportunity to satisfy itself that he was a suitable person to establish contract relations with. This was one thing. It was quite another for the plaintiff to couple with his acceptance a proposal that defendant should enter into contract relations with a third party, about which it ostensibly had no knowledge, under stipulations and conditions not disclosed to defendant until it had received plaintiff's letter of October 9, containing full information as to the obligations defendant was to assume toward the obligee, substituted by plaintiff in his stead. If it be conceded that the German American Trust Company had been mentioned by plaintiff to the agent of defendant during his visit to Great Falls early in October, as is intimated in the letter of October 9, there is nothing in the complaint disclosing what was said or [4] what, if any, understanding was reached at that time. The telegram from defendant on October 8, in reply to that of defendant, must be understood as a confirmation of the sale, subject to its approval of the written contract. Up to that point in the negotiations, a formal written contract had not been mentioned. In the light of plaintiff's telegram, indicating that he desired to enter into a formal written contract and asking further confirmation of the sale, the expression "subject to written contract," in defendant's reply, is not to be construed as a demand for a formal written contract, but as a reservation of the right to reject the formal writing if examination of it disclosed terms which could not be accepted. When it ascertained that it was to assume contract relations with the trust company

instead of plaintiff, it had the right to refuse to do so, as it did, and withdraw its offer because it had not been accepted absolutely and unconditionally according to its terms. And it does not aid plaintiff's case that he thereafter proposed to assume the position of obligee and accept delivery of the bonds. The offer was then no longer open to acceptance.

There is some argument in defendant's brief by which it seeks to maintain the proposition that, looking to the correspondence as a whole, including the fact that the bonds were to be delivered in installments, it was the intention of the parties that they should not be mutually bound until they had embodied the result of their negotiations in a written contract. Whether this is so we deem it unnecessary to decide, in view of the conclusion stated above that there was no contract.

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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ANACONDA COPPER MINING CO., APPELLANT, v.  
RAVALLI COUNTY ET AL., RESPONDENTS.

(No. 3,668.)

(Submitted May 16, 1916. Decided June 7, 1916.)

[158 Pac. 682.]

*Taxation—Real Property—Mineral and Other Reservations—  
Double Taxation—Presumptions.*

**Taxation—Real Property—Mineral and Other Reservations.**

1. Where lands are sold with reservations in the grantor of the minerals therein and the right to mine the same, as well of a right of way over them for mining purposes and for the removal of timber from adjoining lands, such reservations constitute property subject to taxation.

**Same—Double Taxation.**

2. Where an assessor listed for taxation lands with the reservations of minerals, mining rights, *etc.*, to the grantee for the full cash value, *etc.*, and, at the same time, assessed the grantor's reservations at a certain amount per acre, there was a case of double taxation of the same property.

**Same—Double Taxation—Who may Complain.**

3. The only person who can complain of a double assessment is the one who is made to bear more than his proportion of the burden of

taxation; therefore the former owner of the lands mentioned above, to whom the mineral and other reservations were properly assessed, was not in a position to complain of taxes unjustly exacted from his grantees on property belonging to it.

[As to classification of property for purposes of taxation, see note in 62 Am. St. Rep. 175.]

Same—Payment by Other Than Owner—Effect.

4. Before payment of A's taxes by B acts as a full discharge of B's obligation, it must have been made under such circumstances that it cannot be recovered back.

Same—Validity—Presumptions.

5. Every presumption favors the validity of a tax collected from an owner of property, and before he can escape his full part of the burden imposed for state and local purposes, he must present facts disclosing that the taxes had been paid and the lien fully discharged.

*Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.*

ACTION by the Anaconda Copper Mining Company against Ravalli County, and H. L. Hart, County Treasurer. Judgment for defendants, new trial denied and plaintiff appeals. Affirmed.

*Mr. Elmer E. Hershey*, for Appellant, submitted a brief and argued the cause orally.

The listing of a portion of the lands in question as mineral and mineral rights was a reassessment of part of the same lands, and to this extent was a double tax, and therefore illegal and void. In *Spring Valley Water Co. v. Alameda County*, 24 Cal. App. 278, 141 Pac. 38, the assessor of Alameda county, California, was dealing with "riparian water rights," instead of "mineral rights" which were claimed by the plaintiff in that case separate and apart from the lands itself, as in the case under consideration the minerals are claimed separate and apart from the land in question. In that case it was said: "Double taxation does not necessarily consist in assessing the same property twice to the same person, but may consist in requiring a double contribution to the same tax on account of the same property, though the assessments are to different persons." (See, also, *Cooley on Taxation*, 2d ed., 225; *San Francisco v. Fry*, 63 Cal. 470, 472; *Germania Trust Co. v. City of San Francisco*, 128 Cal. 589, 61 Pac. 178.)

*Mr. J. B. Poindexter*, Attorney General, and *Mr. Wm. H. Poorman*, Assistant Attorney General, for Respondents.

An assessment which read "coal and other minerals" was held sufficient to charge the estate in land with the assessment, which estate was created by the conveyance of the mineral rights. (*Board of Commissioners v. Lattas Creek Coal Co.*, 179 Ind. 212, 100 N. E. 561.) And "such estate is as much of an estate as was the surface estate after the separation by this deed." (*Gordon v. Million*, 248 Mo. 155, 154 S. W. 99, 101; *State v. Downman* (Tex. Civ.), 134 S. W. 787; *Benavides v. Hunt*, 79 Tex. 383, 389, 15 S. W. 396.)

As was stated in the case hereafter cited, it is not here contended by the respondent that the county is vested with authority to "assess coal and other minerals as such 'as it lies impacted between the stratas of stone, slate or clay in the state of nature,' " for in its natural state, coal and other mineral will pass with a conveyance of the land as a part of the real property. We maintain that by reason and virtue of the exception and reservation contained in the deed, an actual freehold estate of inheritance in the land—in the real property itself—remains vested in the appellant, and that as such estate, it is subject to assessment and taxation. (*Northern Pac. R. Co. v. Mjelds*, 48 Mont. 287, 137 Pac. 386.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to 1913 the Anaconda Copper Mining Company had owned certain lands in Ravalli county which it had sold, reserving to itself the minerals and the right to mine the same; also a right of way over the land, or any part, for mining purposes or for removing timber from adjoining lands. In 1913 the assessor listed these lands, with the reservations, for purposes of assessment and taxation to the grantees of the company for the full cash value, and at the same time assessed the reservations to the company at \$5 per acre. An effort to have this latter assessment canceled was unsuccessful, the taxes thereon

were paid under protest, and this action brought to recover back the amount. The cause was submitted upon the pleadings, amended somewhat by an agreement as to the facts, and from a judgment for defendants and from an order refusing a new trial, plaintiff appealed.

It is settled by the Constitution and statutes of this state and [1] decision of this court that the reservations mentioned constitute property which is subject to taxation. (Const., Art. XII, secs. 16, 17; Rev. Codes, secs. 2498, 2501; *Northern Pac. R. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386.)

We agree with appellant that the record presents a case of [2, 3] double taxation of the same property, but we agree likewise with the learned trial court that the real question for determination is: Who may complain of a double assessment where the same property is listed to two different persons?

Any objection which might have been urged against the valuation placed upon these reservations was waived, and the record presents these facts: Plaintiff owned the reservations; they constituted property subject to taxation; that property was correctly assessed to its owner, and the tax levy was in all respects lawful; but it is insisted that plaintiff should not have been compelled to pay the tax because the same property was assessed to plaintiff's grantees and the tax thereon paid by them. It is the duty of the assessor to "ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the state board of equalization, and must assess such property to the persons by whom it was owned or claimed or in whose possession or control it was at 12 o'clock M., of the first Monday of March next preceding." (Sec. 2510, Rev. Codes.) So far as plaintiff's interest in these lands was concerned, the assessor complied literally with the commandments of the Constitution and laws of this state. The county clerk discharged his duty in extending the tax levied for state, county and local purposes, and the treasurer performed his duty in collecting the tax from this plaintiff. It is the policy of the law that there shall not be

double taxation of any property; but the law likewise takes cognizance of the fallibility of revenue officers, and undertakes to fortify against any serious consequences arising from errors committed in the assessment of property. Section 2510, above, provides that a mistake in the name of the owner of real property shall not invalidate an assessment otherwise valid. Section 2670 provides: "When the treasurer discovers that any property has been assessed more than once for the same year, he must collect only the tax justly due, and make return of the facts, under affidavit, to the county clerk." Section 2669 provides that any taxes paid more than once, or erroneously or illegally collected, may be refunded; but these provisions and others of like import are intended to secure the collection of lawful revenue and to protect the owner whose property is made to bear more than its just proportion of the burden of taxation, and were not enacted to secure immunity from taxation to any one. There are circumstances under which the payment of A's [4] taxes by B will fully discharge the obligation, but every such payment will not have that effect. To be effective, the payment must have been made under such circumstances that it cannot be recovered back. Every presumption favors the validity of [5] the tax collected from plaintiff, and before it can escape its just proportion of the burden imposed for state and local purposes, it must present the facts which disclose that the tax has been paid and the lien fully discharged, and in this it failed. Under section 2550, Revised Codes, plaintiff was entitled as of right to have its name inserted upon the assessment-roll with each of its grantees, and to have the reservation in every instance assessed to it and not to its grantee, but the record fails to disclose any request of this character. The only person who can complain of a double assessment is the one who is made to bear more than his proportion of the burden of taxation.

Whatever cause for complaint plaintiff's grantees have, plaintiff has none. The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

## TAYLOR, RESPONDENT, v. COMBS ET AL., APPELLANTS.

(No. 3,673.)

(Submitted May 17, 1916. Decided June 12, 1916.)

[158 Pac. 474.]

*Justices' Courts—Judgment by Default—Appeal to District Court.*

1. An appeal to the district court lies from a judgment by default rendered by a justice of the peace.

*Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.*

ACTION by George Taylor against J. Combs and another. From a judgment of the district court, dismissing an appeal from a judgment in a justice of the peace court, defendants appeal. Reversed and remanded.

*Messrs. Day & Mapes*, for Appellants, submitted a brief; *Mr. E. C. Day* argued the cause orally.

*Mr. E. D. Phelan*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action originated in a justice of the peace court. Plaintiff was awarded judgment, and defendants appealed to the district court. In the district court plaintiff interposed a motion to dismiss the appeal on the ground that the judgment of the justice court was a judgment by default. The motion was sustained, and from the judgment which followed, this appeal is prosecuted.

Assuming, without deciding, that the judgment rendered by [1] the justice of the peace court was a judgment by default, the case, upon principle, cannot be distinguished from *Mazey*

v. *Cooper*, 21 Mont. 456, 54 Pac. 562, and upon the authority of that case the judgment of the district court is reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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NORTHWESTERN IMPROVEMENT CO. ET AL., RESPONDENTS, v. RHOADES ET AL., APPELLANTS.

(No. 3,667.)

(Submitted May 15, 1916. Decided June 17, 1916.)

[158 Pac. 832.]

*Mortgages — Assignment — Fraud—Payment—Merger—Principal and Agent—Bills and Notes—Holder in Due Course.*

*Mortgages—Principal and Agent—Fraud—Assignment—Effect.*

1. Where an agent falsely reported to his principal that he had purchased clear title to land with money furnished to him by the latter for that purpose, and later paid a mortgage thereon, causing it to be formally assigned to a third party, who knew nothing of the transaction and paid nothing, any title passed by the assignment vested in the principal.

*Same—Assignment to Owner—Merger.*

2. A mortgage which passed to the owner in fee, who has no intention to keep it alive, is extinguished by merger.

*Bills and Notes—Holder in Due Course—Accepting Overdue Note—Effect.*

3. A bank which accepted a note four years overdue did not become a holder in due course, but took only the title thereto which the assignor, its debtor, had, with the risk of all defects therein as well as of the defenses to it or demands existing at the time against him with reference to it.

*Mortgages—Satisfaction of—What may Constitute.*

4. *Obiter*: Under the circumstances referred to in paragraph 1, *supra*, the action of the agent in paying the mortgagee canceled the debt and satisfied the mortgage, even though such was not his intention.

*Same—Overdue Notes—Accepting Without Inquiry—Effect.*

5. A bank which in consideration of a loan accepted an overdue note and a mortgage securing it without inquiry of the record owner of the mortgaged land, was at fault and was therefore properly adjudged to bear the loss incident to the dishonest transaction mentioned in paragraph 1, *supra*.

[When fraud in delivery of a negotiable note is available as a defense, see note in 37 Am. St. Rep. 456.]

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For cases passing on the question of rights of holder of negotiable paper transferred after maturity, see note in 46 L. E. A. 753 et seq.



*Mr. Elmer E. Hershey*, for Appellants, submitted a brief and argued the cause orally.

"That a note secured by mortgage is overdue does not prevent one holding it under an apparently valid transfer from the true owner from conferring a good title upon an innocent purchaser for value, although he secured the transfer by fraud." (*Gardner v. Beacon Trust Co.*, 190 Mass. 27, 112 Am. St. Rep. 303, 5 Ann. Cas. 581, 2 L. R. A. (n. s.) 767, 76 N. E. 455.) In the note to this case many cases are cited and distinguished. The case of *Young Men's Christian Assn. Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, 70 Am. St. Rep. 135, 46 L. R. A. 753, 54 N. E. 297, is given as closely in point.

Upon the question that appellants could take no better title than Rhoades himself had, or Mulroney, who held the title for Rhoades, had, see *Young Men's Christian Assn. Gymnasium Co. v. Rockford Nat. Bank*, *supra*; *Lee v. Turner*, 89 Mo. 489, 494, 14 S. W. 505; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 329, 7 Am. Rep. 341; 2 Parsons on Notes and Bills, 42 *et seq.*; Tiedeman on Commercial Paper, sec. 295.

"Where an agent, being authorized to pay off a mortgage on his principal's land, fraudulently takes an assignment thereof to himself, an assignment by him of the mortgage to a *bona fide* purchaser for value will vest in the latter a good title thereto, and the principal will be estopped to deny the agent's title." (*Gearon v. Kearney*, 22 Misc. Rep. 285, 50 N. Y. Supp. 26.)

As said in 2 Corpus Juris, section 561, the general rule is such as would entitle appellants to a judgment of foreclosure, and in support of this general rule the decisions of the United States and twelve states are set forth in the note thereto. When proper distinctions are observed, it will be found that the authorities generally support the view that the rights of appellants who took the note in question in good faith for value, though after maturity, must prevail over those of plaintiffs, notwithstanding plaintiffs' agent, in fraud of his principal, caused the transfer of the title of said note to appellants.

*Mr. W. W. Patterson* and *Messrs. Gunn, Rasch & Hall*, for Respondents, submitted a brief; *Mr. Patterson* argued the cause orally.

Notwithstanding the fact that Rhoades procured an assignment of the mortgage to Mulroney and received the note indorsed by the payee, the effect of the transaction, so far as the respondents are concerned, was the payment of the note and the extinguishment of the mortgage lien. The only case cited in the brief for appellants against the foregoing proposition is the case of *Gearon v. Kearney*, 22 Misc. Rep. 285, 50 N. Y. Supp. 26, and that case is a direct authority in support of our contention that the indebtedness secured by the mortgage in question was paid and the mortgage rendered *functus officio*.

As the payment by Rhoades to the mortgagee operated to extinguish the mortgage, notwithstanding the form of the transaction, the mortgage could not thereafter be revived, and consequently the subject matter of the assignment by Mulroney to Keith was not in existence when the assignment was made. (*Bogert v. Bliss*, 148 N. Y. 194, 51 Am. St. Rep. 684, 42 N. E. 582.)

The cases of *Young Men's Christian Assn. Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, 70 Am. St. Rep. 135, 46 L. R. A. 753, 54 N. E. 297, and *Gardner v. Beacon Trust Co.*, 190 Mass. 27, 112 Am. St. Rep. 303, 5 Ann. Cas. 581, 2 L. R. A. (n. s.) 767, 76 N. E. 455, are cited in the brief for appellants. In the first of these cases it was decided that where a negotiable promissory note is indorsed and delivered as collateral security, the pledgee may, even after the maturity of the note, transfer a good title thereto to an innocent purchaser for value. Under such circumstances, the owner of the paper, having clothed the pledgee with every indicia of title, is estopped from questioning the title of such purchaser. In the second case it was decided that an innocent purchaser for value of an overdue note secured by a mortgage obtains a good title, although the party from whom he made the purchase acquired the same by fraud. In both cases, however, the rule that a person cannot

acquire title to overdue commercial paper from a person without title is recognized and declared. The cases of *Lee v. Turner*, 89 Mo. 489, 494, 14 S. W. 505, and *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 329, 7 Am. Rep. 341, do not apply to the facts and circumstances of the case before the court. In both of those cases it was decided that where the true owner of commercial paper clothes another with the evidence of ownership, an innocent purchaser for value from the apparent owner will acquire a good title as against the true owner. These cases are based upon the doctrine of estoppel.

Let us assume that Rhoades purchased, instead of paid, the note. As he was the agent for the plaintiffs, the purchase, when made, inured to the benefit of the plaintiffs and the title vested in them. (*Dowd v. Holbrook*, 152 N. C. 547, 67 S. E. 1060; *Bergner v. Bergner*, 219 Pa. St. 113, 67 Atl. 999; *Clark & Skyles on Agency*, 919.) When, therefore, Rhoades obtained a delivery of the note and had the assignment of the mortgage made to Mulroney, who was acting for Rhoades and had no interest in the transaction, there was, by virtue of the law of merger, an extinguishment of the mortgage lien. The rule is that where the owner of property takes an assignment of a mortgage thereon, the mortgage is destroyed unless there is an intention on the part of the owner to keep the mortgage lien alive. (2 Pomeroy's Equity Jurisprudence, sec. 798.)

The defense, which was available against the enforcement of the mortgage by Mulroney, was not based on an equity in favor of a third party, but was a defense available by the owner of the property at the time the assignment was made by Mulroney to Keith. The title to the property stood of record in the name of the Northwestern Improvement Company, of which Keith was charged with notice. If he had made inquiry of that company, as he was bound to do, as the note was four years overdue and no interest had been paid thereon for several years, he would have learned that Mulroney had no right to make the assignment. Not having made such inquiry, he does not occupy any different or more favorable position than his assignor Mul-

money occupied as against the plaintiffs. (*Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *Nichols v. Lee*, 10 Mich. 526, 82 Am. Dec. 57; *Purser v. Anderson*, 4 Edw. Ch. (N. Y.) 18; *Heppe v. Szczepanski*, 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737; *Shepherd's Ex. v. McClain*, 18 N. J. Eq. 128; *Bennett v. Keehn*, 57 Wis. 582, 15 N. W. 776.)

MR. JUSTICE SANNER delivered the opinion of the court.

Some time prior to January 23, 1907, James M. Rhoades, of Missoula, was employed by the plaintiff railway company to purchase certain lands near Turah in this state, among them the southeast quarter of section 35, township 13 north, range 18 west, and on that date he reported to the company through its land commissioner, Thomas Cooper, that an agreement had been concluded for the purchase of said tract, conveyance to be made by deed of "general warranty, showing a title good in law and equity," for \$5,500. Concluding to purchase at this price, the railway company, through Mr. Cooper, directed Rhoades to procure abstracts, and sent him funds to make the purchase as soon as counsel, to whom the abstracts were to be sent, should approve the title. Further instructions were to have the conveyances run to the plaintiff Northwestern Improvement Company, which is a corporation subsidiary to the railway company and holds much of its lands for its benefit. Rhoades procured the abstracts, and sent the same to counsel, who promptly notified Cooper that title was unsatisfactory in two respects, one of which related to a mortgage standing of record in favor of Leonora B. Forbis; whereupon Cooper wired Rhoades not to close the transaction, and mailed him a copy of counsel's letter, calling attention to the title defects therein noted, and to the fact that the mortgage would have to be satisfied. On May 9, 1907, responsive to an inquiry from Cooper, Rhoades reported that he was holding the money in bank awaiting title clearances, to be paid over "as soon as title is approved," and on May 25, 1907, he inclosed to Cooper a conveyance of the property from the owners of record, together with a quitclaim and affidavit from

certain predecessors in the title, as called for by counsel, stating at the same time that "the case is now closed," although in point of fact the mortgage had not been satisfied. Later, and on February 12, 1908, Rhoades appeared before E. C. Mulroney, the attorney for Leonora B. Forbis, and paid the amount of principal and interest due her, took the note indorsed "without recourse," and caused the mortgage to be formally assigned to John M. Mulroney, of Iowa, who knew nothing of the transaction at the time, and who paid nothing for the assignment. Thereafter the assignment was placed of record, and in June, 1911, Rhoades, being indebted to the defendant bank and desiring further accommodation, represented that he was the owner of said note and mortgage, and offered the same as collateral security. His offer was accepted, and he turned over the note and caused John M. Mulroney to assign the mortgage to the defendant Keith as president of the bank. The note was then nearly four years overdue, and title to the property affected by the mortgage stood of record in the plaintiff Northwestern Improvement Company; but neither the bank nor Keith had any knowledge of the circumstances under which Rhoades became possessed of the note or control of the mortgage. Thereafter, in consequence of demands of the bank, plaintiffs became advised of what had occurred, and brought this suit against Mulroney, Rhoades, Keith and the bank, to clear the record of the mortgage. All answered, Mulroney disclaiming any interest, and the bank seeking a foreclosure by way of cross-complaint or counterclaim. There was no conflict in the evidence, and judgment was given for the plaintiffs. The bank and Keith appeal from that judgment as well as from an order denying them a new trial.

The judgment is assailed upon the ground that, though the appellants took the note and mortgage long after maturity, and therefore subject to any defenses available to the maker, they did not take subject to latent equities in favor of third parties, and therefore the case made, showing that the mortgage appeared of record to be a valid and subsisting lien standing in the

name of Mulroney, and that neither the bank nor Keith had knowledge of any infirmity in the transaction, was insufficient.

We think the correct result was reached in this case for several reasons:

(a) The right of the appellants could not be established by [1] the record of the assignment to Mulroney and his assignment to Keith, because they fully understood that Rhoades—not Mulroney—was the claimant of the mortgage, and Mulroney's assignment for Rhoades was valueless unless Rhoades had title to the mortgage as a subsisting lien. Such was not the fact. So far as the record discloses, the payment by Rhoades to the mortgagee occurred while he was still in the employ of the railway company; but whether this be so or not, he remained its agent for the purpose of completing what he had undertaken. Hence it matters little whether his payment to the mortgagee was intended by him as a purchase for his benefit or that of his principals, because the nature of his agency was such that any title to the mortgage which passed by virtue of the assignment vested at once in his principals. (2 Corpus Juris, 705, and notes; *Dowd v. Holbrook*, 152 N. C. 547, 67 S. E. 1060; *Bergner v. Bergner*, 219 Pa. 113, 67 Atl. 999.) [2] As they were the owners of the fee, and as they had no intention to keep the mortgage alive, if that were possible, the lien thereof became extinguished by merger. (2 Pomeroy's Equity Jurisprudence, sec. 796 *et seq.*)

(b) Again, the right of the appellants depends upon their situation with reference to the note, to which the mortgage was [3] a mere incident. (Rev. Codes, sec. 5746; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.) Confessedly the bank did not become a holder of the note in due course (Rev. Codes, sec. 5900), but took only the title thereto which Rhoades had (Rev. Codes, sec. 4913), accepting the risk of all defects therein (Rev. Codes, secs. 5905-5907; 46 L. R. A. 776 *et seq.*), as well as of defenses to the note or demands existing at the time against Rhoades with reference to the note (Rev. Codes, secs. 6478, 6542, subd. 2). Assuming

therefore, that Rhoades got title to the note, *prima facie*, as the result of the indorsement and delivery of it to him, then these provisions of Code section 5903, come into play: "The title of a person who negotiates an instrument is defective when he obtained the instrument, or any signature thereto, by fraud \* \* \* or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." In virtue of his position as agent of the plaintiffs, Rhoades became aware of the Forbis mortgage, and became charged with the duty to secure its satisfaction for the benefit of his principals out of funds furnished him for the purpose of acquiring clear title to the land. He could not, without fraud, obtain the note, and with it the mortgage, for himself (1 Mechem on Agency, secs. 1198, 1199, 1210); and if in doing so he got any title at all, it was such as could and would be overthrown whenever his principals might choose to assail it in his hands. Neither, having the note, could he assign it as his own without a flagrant breach of faith, but by that very fact would pass a title so defective that the respondents, acting with reasonable diligence after discovery of the fraud, could easily defeat it.

(c) Finally, there is reason for the view that the act of [4] Rhoades in paying the mortgagee canceled the debt and satisfied the mortgage, even though such was far from his intention. An interesting and informing case of analogous character may be found in *Gearon v. Kearney*, the first report of which (22 Misc. Rep. 285, 50 N. Y. Supp. 26) is cited and quoted by the present appellants as supporting their contention, but which was reversed on appeal (*Gearon v. Greene*, 32 App. Div. 258, 52 N. Y. Supp. 1013), and retried with an exactly opposite result, subsequently affirmed (47 App. Div. 636, 62 N. Y. Supp. 48). In that case, Kearney, the owner, retained Nafis, an attorney, to procure a loan for the purpose of paying off two existing mortgages duly recorded, and running, respectively, to one Roberts for \$1,800, and to one McCann for \$1,200; to this end Kearney under Nafis' instructions, executed a mortgage for \$3,000 running to one Anderson, and Nafis, out of the

proceeds paid Roberts the amount of his mortgage, but, instead of satisfying it of record, took an assignment of it to Anderson. Later Nafis caused all these mortgages to be assigned to himself, and thereafter transferred them to different parties in the following order: First, the \$3,000 mortgage, with the representation that it was a prior mortgage; next, the Roberts mortgage; and lastly, the McCann mortgage. The question presented by the litigation was the right of the innocent purchasers of the Roberts and McCann mortgages, which were prior of record, to prevail over the innocent purchaser of the \$3,000 mortgage, and in the final disposition of it the court said: "The evidence of Kearney shows that he executed the \$3,000 mortgage for the purpose of raising that amount to apply in discharge of the two existing mortgages on the property, and that Nafis agreed to so apply such money. The evidence of Mrs. Anderson is to the effect that she gave the \$3,000 to Nafis to be invested on a first mortgage, and that he agreed with her to make such investment. By reason of these agreements of Nafis with Anderson and Kearney, it became his duty to apply the sum received from Mrs. Anderson in satisfaction and discharge of the earlier mortgages. When, therefore, instead of satisfying the \$1,800 mortgage, he took an assignment of it to Mrs. Anderson, the transaction operated as a payment despite the form or shape it assumed. \* \* \* By the assignment from Mrs. Anderson to Nafis the rights of the latter could not be greater than those of the former. \* \* \* As to the \$1,200 mortgage the case differs, in that Nafis did not pay it and take an assignment, until after he had assigned the \$3,000 mortgage. \* \* \* But Nafis, at the time he took the assignment of this mortgage, was still under agreement with the owner of the land to pay off and discharge that mortgage with the proceeds of the Anderson mortgage. Part of those proceeds were still in his hands for that purpose, or at least such is the presumption of law. When he took up the mortgage and had it assigned to himself, as against the owner of the land the mortgage was paid. Nafis could have maintained no action upon it. The result was



that, before either of these earlier mortgages was assigned to the plaintiff, they were, as a matter of law, paid and satisfied, though not discharged of record.”

The suggestion is made that, as between the appellants and the respondents, the latter should suffer, because it was their [5] fault that Rhoades was enabled to present himself to the appellants in the aspect of an owner of the note and mortgage. This, in the absence of anything to create an estoppel as against the respondents, ignores the duty of inquiry put upon the purchaser of past-due paper. The debt evidenced by the note was by virtue of the mortgage, made a charge upon specific lands the title to which stood of record in the Northwestern Improvement Company, and that company would be called on, of necessity, to pay in place of the original maker. Its equities were not latent equities of third parties, but equities of a party directly interested, and the simplest inquiry of it would have informed the appellants that these equities were such that nothing of value could be conveyed to them by Rhoades. In the last analysis, therefore, the fault was the appellants, and for it they must suffer.

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

## ELIJAH, APPELLANT, v. WRIGHT, RESPONDENT.

(No. 3,876.)

(Submitted May 19, 1916. Decided June 19, 1916.)

[158 Pac. 475.]

*Real Property—Use and Occupation—Conversion—Complaint—Insufficiency — Pleading — Reply — Presumptions—Amendments.*

**Real Property—Use and Occupation—Conversion—Complaint—Insufficiency.**

1. A complaint alleging defendant's occupancy and use of plaintiff's land, the value of its use, refusal to pay and that the defendant fed the hay raised thereon, but failing to aver acts which constituted a breach of contract or a civil wrong, was insufficient to state a cause of action.

**Pleading—Insufficient Complaint not Aided by Reply.**

2. Since the allegations of a reply are deemed by the statute to be denied, they cannot aid an insufficient complaint.

**Same—Writing—Presumptions.**

3. For the purposes of pleading, it will be presumed, in the absence of an allegation to that effect, that a lease was in writing, if a writing was necessary to its validity.

**Same—Amendment—When Refusal not Error.**

4. Where, if allowed, the defect in a complaint would not have been cured by an amendment offered during trial, its refusal was not error.

[As to implied contract to pay rent for use of another's land for grazing cattle, see note in *Ann. Cas.* 1912C, 1147.]

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by David Elijah against William F. Wright. Judgment for defendant and plaintiff appeals from it and an order denying him a new trial. Affirmed.

*Mr. E. G. Worden* and *Mr. E. W. Mettler*, for Appellant, submitted a brief; *Mr. Worden* argued the cause orally.

*Mr. J. C. Huntoon*, for Respondent, submitted a brief.

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint in this action is in three divisions. The first of these divisions alleges plaintiff's ownership of certain lands

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As to when action for use and occupation will lie, see notes in 14 L. R. A. 156 and 26 L. R. A. 802.

and premises; "that during the year 1909 the defendant, William F. Wright, occupied and farmed the said lands and premises; that the use of said premises for the year 1909 was reasonably worth the sum of \$1,075.92; that defendant has not paid the same or any part thereof," etc. The second division is in precisely similar terms, save that the year mentioned is 1910 and the value alleged is \$215.36. The third division alleges that in November, 1908, "the defendant fed to his stock, and thereby converted to his own use and benefit, five tons of hay and five loads of straw, the property of J. H. Elijah, of the reasonable value of \$75; that J. H. Elijah assigned his claim to plaintiff; and that the same has not been paid." A general demurrer to this complaint was overruled; whereupon the defendant filed his answer containing, among other things, an affirmative plea that he occupied and farmed the lands, and became entitled to the crops, pursuant to a lease from plaintiff's grantor in 1906. By way of reply the plaintiff admitted that defendant's possession and operations were pursuant to the lease pleaded by the defendant, but alleged that said lease was oral and void as against him, the purchaser of said land in 1907, because it was by its terms not to be performed within one year.

The errors assigned present two questions whether the complaint states any cause of action standing alone, or as aided by the answer, and whether there was error in refusing to allow certain amendments during the trial.

That the complaint, standing alone, does not state any cause [1] of action, seems to us perfectly clear. One may certainly occupy and farm another's land and feed another's hay without any liability either in contract or in tort. He may do it as an agent, for the other's use and benefit, or he may do it for his own use and benefit, with the other's consent, or he may do it as a tenant under valid lease, holding over after transfer of the fee. One may also farm another's land and feed another's hay and be liable, yet not liable for the value of such use or hay, because of a special contract. To state a

cause of action, facts must be alleged which put the defendant in fault. The complaint is barren of any allegation sufficient to characterize the defendant's acts as a breach of contract or as a civil wrong.

Neither, in our opinion, was the complaint aided by the answer. Confessedly the so-called third cause of action was not [2, 3] so aided. As to the first and second the claim to such aid is based upon the plea of a lease in the answer, coupled with the allegation of the reply that such lease was oral. The allegation of the reply may be disregarded. Deemed by the statute to be denied, it could not aid the complaint, nor, for the purposes of the pleading, characterize the lease. According to the answer there was a lease. Whether the lease was written or oral is not stated, but for the purposes of pleading it will be presumed to have been written, if a writing is necessary to its validity. How the complaint could be aided by saying that the defendant farmed the premises and took the crops under a valid written lease is beyond our comprehension.

The plaintiff first sought leave to amend his complaint by [4] alleging that the occupancy and use of the land during 1909 and 1910 was for the defendant's "own use and benefit." This being refused, he later sought and was denied leave to insert in both the first and second causes of action the following: "(1a) That during the years 1906 and 1907 the defendant occupied and farmed the said premises under an oral lease with E. H. Huffmaster, the then owner of said premises, and that during the month of November, 1907, the said Huffmaster sold and conveyed said premises to plaintiff, but that the said defendant remained in possession of and farmed the said premises until and including the year 1909, as hereinafter set forth." Neither of these proposed amendments cured the defects in the complaint, and for that reason alone their refusal may be justified.

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

## DAVIDSON, APPELLANT, v. DAVIDSON, RESPONDENT.

(No. 3,872.)

(Submitted May 17, 1916. Decided June 19, 1916.)

[158 Pac. 680.]

*Divorce—Jury Trial—Constitution.**Jury Trial—Constitution.*

1. Under section 23, Article III, of the state Constitution, the right of trial by jury is preserved as it existed at the time the Constitution was adopted.

*Same—Divorce Suit.*

2. *Held*, under the rule above, that since the right to a trial of a contested divorce suit did not exist at the time the Constitution was adopted, a party to such a suit may not now demand, as a matter of right, a jury trial of the issues raised by the pleadings.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

DIVORCE suit by Minnie Isabel Davidson against James Davidson, in which defendant filed a cross-bill. From a judgment denying relief to either party plaintiff appeals. Affirmed.

*Messrs. Jesse B. Roote and H. C. Hopkins*, for Appellant, submitted a brief; *Mr. Hopkins* argued the cause orally.

The right of trial by jury existed at the time of the adoption of the Constitution. It cannot become obsolete, for it is made perpetual by the Constitution. (*Kleinschmidt v. Dunphy*, 1 Mont. 118; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *State v. Sengstacken*, 61 Or. 455, Ann. Cas. 1914B, 230, 122 Pac. 292; *State ex rel. West v. Cobb*, 24 Okl. 662, 24 L. R. A. (n. s.) 639, 104 Pac. 361; *Baker v. Newton*, 112 Pac. 1034; *Ex parte Dagley*, 35 Okl. 180, 44 L. R. A. (n. s.) 389, 128 Pac. 699; *In re Byrd*, 31 Okl. 549, 122 Pac. 516; *Mead v. Walker*, 17 Wis. 189; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; *State v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958; *Wheeler v. Caldwell*, 68 Kan. 776, 75 Pac. 1031.)

*Messrs. Canning & Geagan*, and *Mr. E. P. Kelly*, for Respondent, submitted a brief; *Mr. Patrick E. Geagan* argued the cause orally.

When Article III, section 23 of the state Constitution provides, that "the right of trial by jury shall be secured to all, and remain inviolate," it refers to the right as it existed under the common law, and not to suits in equity. (*Consolidated Gold & S. Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152; *Cassidy v. Sullivan*, 64 Cal. 266, 28 Pac. 234.) Actions for divorce are actions in equity (*Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25; *Beck v. Beck*, 6 Mont. 318, 12 Pac. 694; *Leggat v. Leggat*, 13 Mont. 190, 33 Pac. 5; *Edgerton v. Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557, 16 L. R. A. 94, 29 Pac. 966); hence the rules governing equity actions must be applied by the trial courts. It is not necessary to call a jury in an equity case, in order to correctly determine the issues and dispose of the case. (*Basey v. Gallagher*, 20 Wall. (87 U. S.) 670, 22 L. Ed. 452; *Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U. S. 509, 33 L. Ed. 433, 10 Sup. Ct. Rep. 177.)

If called in an equity case, the jury sits in an advisory capacity only, and the chancellor is at liberty to disregard its findings or conclusions and make findings and conclusions of his own. He is responsible for the decree or judgment. (*Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Beck v. Beck*, *Leggat v. Leggat*, *Bordeaux v. Bordeaux*, *supra*.)

So that, if the judge believes that he will not accept the advice of a jury, but will be governed entirely by his own judgment, it is an idle act for him to call a jury. And the law does not at any time require the doing of an idle act.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is a suit for divorce on the ground of extreme cruelty. The defendant appeared and denied the charges contained in the complaint, and presented a cross-bill the allegations of which were put in issue by reply. When the cause was called

for trial, plaintiff requested that a jury be impaneled to determine the issues raised by the pleadings, but the request was denied, and this ruling is the only alleged error presented upon the appeal from the judgment which denied relief to either party.

Section 23, Article III, of the state Constitution provides: [1] "The right of trial by jury shall be secured to all and remain inviolate." This language was not intended to contract or expand the right, but to preserve it as it existed when the Constitution was adopted. (*Consolidated G. & S. Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152.) If on November 8, [2] 1889, a party to a contested suit for divorce could, as a matter of right, demand a jury trial of the issue raised upon the charges contained in the complaint, the right was perpetuated by the provision of the Constitution quoted above. (*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554.) To establish the existence of that right, appellant invokes the provisions of sections 1000 and 1003, Division 5, Compiled Statutes of 1887, as follows:

"Sec. 1000. The district court, sitting as a court of chancery, shall have jurisdiction in all cases of divorce and alimony by this chapter allowed, and the like process, practice, and proceeding shall be had as they are usually had in other cases in chancery, except as hereinafter provided."

"Sec. 1003. In all cases of divorce, when the defendant shall appear and deny the charges alleged in the complainant's bill, the same shall be tried by a jury."

These statutes were not new in the legislative history of the territory when the constitutional convention assembled. They are, respectively, sections 2 and 5 of "An Act concerning divorce and alimony," passed by the First Territorial Legislative Assembly and approved February 7, 1865. (Bannack Statutes, p. 430.) They were carried forward through the several compilations, retaining whatever vitality they ever had, until repealed by the Codes in 1895.

Bearing in mind that anciently matters of divorce were cognizable only in ecclesiastical courts and were unknown to chancery, it is quite apparent that the legislature had in mind a double purpose to subserve: To confer upon the courts of equity, jurisdiction not theretofore enjoyed by them; and to regulate in a measure the practice and procedure which should obtain in those courts with reference to the newly acquired jurisdiction. While a jury was to be called in the instance mentioned to determine the issue "cause for divorce" or "no cause for divorce," the court retained its character as a court of chancery, and in every other respect was compelled to proceed according to the well-established rules of equity practice.

In *Black v. Black*, 5 Mont. 15, 2 Pac. 317, these statutes were first called to the attention of this court. The facts presented by that case brought it clearly within the class of cases to which section 1003 referred. Judge Conger, distinguished for his learning and ability, presided in the trial court, called a jury to whom he submitted special interrogatories, and upon the findings returned, supplemented by findings made by himself, he rendered a decree dissolving the bonds of matrimony and awarding to the plaintiff custody of the minor child, alimony, expense money and counsel fees. On appeal, this court referred to the sections now under consideration, but practically without comment. A slight modification of the decree, with reference to interest, was made, but the practice pursued in the trial court was apparently approved. The case is instructive only in so far as it indicates that the practice in the territory, for the twenty years succeeding the first enactment of these provisions, followed the recognized rules in courts of chancery. But, if any doubt whatever remained as to the view entertained by the highest court of the territory as to the proper practice to be pursued, notwithstanding the language of section 1003, that doubt was removed in *Beck v. Beck*, 6 Mont. 318, 12 Pac. 694. The opinion was by Chief Justice Wade who delivered the opinion in the *Black Case*. Speaking for the court, he said: "This is an action for divorce. There was a trial before a jury



and a general verdict in favor of plaintiff. The defendant thereupon made a motion for a judgment in his favor, notwithstanding the verdict for plaintiff, and this motion was granted. The appeal is from the judgment, and there is no evidence in the record. Divorce cases are of chancery jurisdiction (Rev. Stats., sec. 508), and in such cases the decree must proceed from the chancellor. Verdicts or special findings are merely advisory, and may be approved or disregarded as the conscience of the chancellor may demand."

Whatever, if any, criticism may be made of the decision in *Beck v. Beck*, this much is to be said of it: It established the law of the territory respecting the procedure in contested divorce cases. Thereafter section 1003 was to be understood as conferring no new right, but as merely crystallizing in statutory form the ancient rules of equity: that a jury cannot be demanded as a matter of right; that the findings of a jury are only advisory and may be set aside at the will of the chancellor. This case was decided more than two years before the constitutional convention assembled, and we must therefore indulge the presumption that the members, in framing section 23 of Article III, employed the terms advisedly and with reference to the law as declared by the highest court of the territory.

The supreme court of this state, perhaps unwittingly affirmed the territorial court in *Beck v. Beck*, though without specific reference to that case. In *Montana Ore Purchasing Co. v. Boston & Mont. etc. Min. Co.*, 27 Mont. 536, 71 Pac. 1005, this court declared that the right of trial by jury, secured by the Seventh Amendment to the Constitution of the United States, is the right as it existed at common law, and that "the right of trial by jury under the territorial government was exactly the same as that guaranteed by this amendment—no greater, no less."

There is some additional evidence that the territorial legislature did not intend to invade the province of the courts of equity and compel the submission of disputed questions of fact, arising therein, to the arbitrament of jury trials. Sec-

tion 155 of the Civil Practice Act, approved December 23, 1867, provided: "An issue of fact shall be tried by a jury, unless a jury trial is waived or a reference be ordered as provided in this Act." (Laws 1867, p. 163.) In *Kleinschmidt v. Dunphy*, 1 Mont. 118, the territorial court held that the provision above was applicable to a suit in equity, but, on appeal to the supreme court of the United States, that decision was reversed. The court said: "The case, being a chancery case and being instituted as such, should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts, the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury." (*Dunphy v. Kleinschmidt*, 11 Wall. (U. S.) 610, 20 L. Ed. 223.)

Section 241 of the Code of Civil Procedure enacted in 1877 (Laws 1877, p. 98) and carried forward as section 250, Code of Civil Procedure, Compiled Statutes of 1887, provided, among other things: "In all cases, issues of fact must be tried by a jury (except in actions which involve the settlement of accounts between parties), unless a jury shall be waived by the parties." Although specific reference to this statute was not made by the territorial court in *Gallagher v. Basey*, 1 Mont. 457, on appeal to the supreme court of the United States, the court did refer to it and said: "This discretion to disregard the findings of the jury may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion. That statute [section 250 above] is substantially a copy of the statute of California as it existed in 1851, and, it was frequently held, by the supreme court of that state, that the provision in that Act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate

the findings was made by the parties, if in his judgment they were not supported by the evidence." (*Basey v. Gallagher*, 20 Wall. (U. S.) 670, 22 L. Ed. 452.) The supreme court of the United States did not treat either of these statutes as conferring a *right* to a jury trial in an equity case, though their terms were sufficiently broad to include every civil action, whether at law or in equity.

Since the right to a trial by jury of a contested divorce suit did not exist at the time the state Constitution was adopted, the guaranty contained in section 23, Article III, does not refer to such a right.

The judgment is affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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## HENROID, ADMINISTRATOR, APPELLANT, v. GREGSON HOT SPRINGS CO., RESPONDENT.

(No. 3,677.)

(Submitted May 19, 1916. Decided June 20, 1916.)

[158 Pac. 824.]

*Death in Natatorium—Damages—Negligence—Burden of Proof—Minors—Trespassers Ab Initio—Appeal and Error—Nonsuit—Correct Result—Wrong Reason.*

Appeal and Error—Nonsuit—Correct Result—Wrong Reason.

1. If a ruling granting a nonsuit was correct, though based upon an erroneous reason, it will nevertheless be affirmed.

Damages—Death in Natatorium—Negligence—Burden of Proof.

2. In an action to recover damages for the death of a minor by drowning in defendant's natatorium, it was incumbent upon plaintiff administrator to make out a *prima facie* case of actionable negligence in favor of the deceased in his lifetime and against the defendant.

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Cases passing on the question of liability of persons maintaining bathing resort for hire for safety of patrons, see notes in 3 L. E. A. (n. s.) 982; 32 L. E. A. (n. s.) 715; 38 L. E. A. (n. s.) 72, and 42 L. E. A. (n. s.) 1073.

**Same—Swimming-pools—Care Required—Minors.**

3. One who operates for profit a swimming-pool to which the public are invited, owes to patrons a duty which is measured by the standard of ordinary care proportionate to the risk to be apprehended and guarded against, a higher degree of care being due to a minor thirteen years old whom he knows cannot, than to one whom he knows can, swim.

**Same—Trespasser *Ab Initio*—Duty Owing to.**

4. If plaintiff's intestate secured admission to defendant's swimming-pool by representing to the person in charge that he could swim when in fact he could not, he became a trespasser *ab initio* to whom the defendant proprietor owed no duty other than to refrain from willfully or wantonly injuring him.

[As to diligence required when a human life is involved, see note in 77 Am. St. Rep. 26.]

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Edward J. Henroid, as administrator of the estate of Leo Henroid, deceased, against the Gregson Hot Springs Company. Judgment for defendant and plaintiff appeals. Affirmed.

*Messrs. Maury, Templeman & Davies and Mr. C. M. Sawyer, for Appellant, submitted a brief; Mr. J. O. Davies argued the cause orally.*

Keepers of bathing resorts and plunges where the people are invited to bathe must adopt every reasonable precaution and every reasonable method to provide assistance to any and all, whether children or adults, who may meet with any accident or misfortune while in bathing. (*Larkin v. Saltair Beach Co.*, 30 Utah, 86, 116 Am. St. Rep. 818, 8 Ann. Cas. 977, 3 L. R. A. (n. s.) 982, 83 Pac. 686; *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 58 Am. St. Rep. 709, 33 L. R. A. 598, 67 N. W. 479; *Id.*, 50 Neb. 214, 69 N. W. 757; *Levinski v. Cooper* (Tex. Civ.), 142 S. W. 959; *Turlington v. Tampa Elec. Co.*, 62 Fla. 398, Ann. Cas. 1913D, 1213, 38 L. R. A. (n. s.) 72, 56 South. 696; *Flora v. Bimini Water Co.*, 161 Cal. 495, 119 Pac. 661.) In this state, any person, association or corporation owning or operating a place of amusement for gain is bound to use at least ordinary care for the protection of its patrons. (*Phillips v.*

*Butte etc. Fair Assn.*, 46 Mont. 338, 42 L. R. A. (n s.) 1076, 127 Pac. 1011.)

At the trial the defendant induced the trial court to grant a nonsuit by a very ingenious argument. It contended that in death by drowning the injury was a continuing one, and as it was not completed until death actually took place, death by drowning was instantaneous, or, in other words, that the person did not survive the injury; that since in drowning cases medical and surgical skill had developed to such an extent that it was possible to save the life of a drowning person at almost any moment before life actually departed from the body; that the extent of the injury was not certain and definite or completed until death actually took place, and therefore the person did not survive the completed injury. This contention was based upon the *dictum* found in the case of *Oliver v. Houghton Co. St. Ry. Co.*, 134 Mich. 367, 104 Am. St. Rep. 607, 3 Ann. Cas. 53, 96 N. W. 434, and is as follows: "We see no reason for splitting hairs as to what is meant by instantaneous death, though we can appreciate the difference between a continuing injury resulting in drowning, or death by hanging, throwing from a housetop, *etc.*, and one where a person survives the wrongful act in an injured condition."

No case was cited, and we do not believe that any can be found where a court holds directly that death by suffocation, strangulation, asphyxiation or drowning is instantaneous. This question has been definitely settled in Montana in our favor by the case of *Beeler v. Butte & London Dev. Co.*, 41 Mont. 465, 110 Pac. 528.

In the case of *Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867, the court held under a survival statute that death by drowning was not instantaneous, and did so without there being any expert testimony in the record. They based their conclusion on the common and general knowledge of mankind in such cases. In the case of *Nourse v. Packard*, 138 Mass. 307, the court went so far as to hold that in a case of death by drowning, under a survival statute plaintiff could recover for conscious pain and

suffering—in this case the asphyxiation being produced by grain instead of water. (See *Finnegan v. Fall River Gas Works*, 159 Mass. 311, 34 N. E. 523; *Martin v. Boston R. Co.*, 175 Mass. 502, 56 N. E. 719; *St. Louis etc. R. Co. v. Stamps*, 84 Ark. 241, 104 S. W. 1114; *Texarkana Gas Co. v. Orr*, 59 Ark. 215, 27 S. W. 66; *Perkins v. Oxford Paper Co.*, 104 Me. 109, 71 Atl. 476; *St. Louis, I. N. & S. Ry. Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46; *Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146.)

*Mr. L. O. Evans* and *Mr. W. B. Rodgers*, for Respondent, submitted a brief; *Mr. Rodgers* argued the cause orally.

Neither upon the complaint nor under the testimony could this case have been submitted to the jury except upon the theory that upon the operator of every bathing-pool, no difference how shallow the water might be in such pool, and no difference what precautions were taken to warn all persons of the depth of the water in which they were about to bathe, and no difference what regulations were enforced as to who should bathe in such pool, in reference to size, age and ability to swim, there is, by the law, cast upon such operator the absolute duty at all times to have attendants present to watch over and look after such bathers. Such is not the law. The cases cited by appellant do not justify this conclusion. The circumstances of each of those cases are so divergent from the case at bar that it may safely be said that they have no application whatever; and the most that could possibly be claimed for the rule is that if, under the particular circumstances of each case, reasonable care required that the operator of the bathing-pool take such precautions, he may be required to do so. (*McKinney v. Adams*, 68 Fla. 208, L. R. A. 1915D, 442, 66 South. 988, 993.) No such duty is cast upon the operator when the bather is not encountered by any undisclosed dangers and when he either understands, or ought to understand, the perils of bathing equally as well as the owner and operator of the bathing-pool. The law does not charge anyone with the duty of anticipating careless or reckless conduct on the part of another, or with the duty of

being more careful of another's safety than that person is of his own.

If the Henroid boy could not swim, then he was a trespasser from the beginning, and was in defendant's plunge without right and by means of false representations, and the defendant owed him no duty other than not to willfully do him an injury. (3 Thompson on Negligence, sec. 3323; 2 White's Supplement on Negligence, secs. 1070, 3323; *Gerahn v. International & G. N. R. R. Co.*, 5 L. R. A. (n. s.) 1025; *Broyles v. Central of Georgia Ry. Co.*, 166 Ala. 616, 139 Am. St. Rep. 50, 52 South. 81; *Toledo etc. Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Egan v. Montana C. Ry. Co.*, 24 Mont. 569, 570, 63 Pac. 831; *Gates v. Northern Pacific Ry. Co.*, 37 Mont. 103, 115, 94 Pac. 751.)

There was no evidence that the deceased survived for any appreciable time the injury causing his death, or, speaking more accurately, the application of the external forces producing the injury causing his death; but, on the contrary, the evidence shows that the death of deceased was simultaneous with such injury, and therefore the death was what is known in law as an instantaneous death. Since this suit is an administrator's suit for a cause of action claimed to have accrued to the deceased during his lifetime, and to have, by virtue of the general survival statutes, survived to the administrator, the burden was upon the plaintiff to prove that the deceased survived the injury which caused his death an appreciable length of time. (*Corcoran v. Boston & A. Ry. Co.*, 133 Mass. 507; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146, 148; *Moran v. Hollings*, 125 Mass. 93.)

The survival rule does not embrace the question as to whether the deceased survived the negligent act ultimately setting in motion the forces producing the injury. Were this the rule, a survival must always transpire. Not only the rule of this court, but the rule of every other court that has ever dealt with this question of survival, requires that the deceased must have survived the injury producing death for an appreciable length of

time after the same was received. (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 491, 100 Pac. 960; *Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146, 148; *Beeler v. Butte & London Copper Dev. Co.*, 41 Mont. 465, 110 Pac. 528, 531; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Moran v. Hollings*, 125 Mass. 93.)

An ordinary death by drowning, such as that of Henroid, falls strictly within the legal idea of an instantaneous death, as applied to the survival of actions. Death results from one injury; this injury is a continuing one, the external force producing the injury continues until the moment of death, and is not fatal until then. (*Moyer v. City of Oshkosh*, 151 Wis. 586, 139 N. W. 379; *Cheatham v. Red River Line*, 56 Fed. 248; *West v. Detroit United Ry. Co.*, 159 Mich. 269, 123 N. W. 1101; *Kearney v. Boston & Worcester R. R. Corp.*, 9 Cush. (Mass.) 108; *Lobenstein v. Whitehead & Kales Iron Works*, 179 Mich. 279, 146 N. W. 293, 297; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Tiffany on Death by Wrongful Acts*, 2d ed., sec. 44.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1913 the Gregson Hot Springs Company owned and operated a natatorium for profit to which the public were invited. The swimming-pool was one hundred and forty-five feet in length by forty-six in width, and, when full, the water varied in depth from four feet two inches to six feet six inches. Fifty-four feet from the west end a large rope was stretched across the pool at about the surface of the water, and forty-eight feet farther east was another rope. By this means the pool was divided into three compartments. On November 1 it had been emptied and was being refilled, so that when the accident occurred the water in the east compartment varied from a maximum depth of five feet ten inches to four feet six inches, in the center compartment from four feet six inches to four feet two inches, and in the west compartment from four feet seven inches



to four feet two inches. About noon of November 1, Leo Henroid, thirteen and one-half years old, alleged to be about four feet eight inches in height, with a companion somewhat smaller applied for bathing suits; paid the required fees; went into the pool; and remained there for nearly two hours. At about 2 o'clock the dead body of Leo Henroid was found in the west compartment, in water four feet five inches deep. Henroid's companion had disappeared, and his identity, as well as the identity of the man who discovered the body, is lost. This action for damages was brought by the administrator of Leo Henroid's estate. The trial court granted a nonsuit, and from the judgment entered thereon plaintiff appealed. ✓

The motion for nonsuit challenged the sufficiency of the evidence to show actionable negligence on the part of the defendant, or to show the existence of a right of action which survived to plaintiff. It was also insisted that plaintiff's case disclosed contributory negligence on the part of the deceased and an assumption of risk by the deceased. In granting the motion the court indicated that its order was made upon the ground alone that the deceased did not survive his injury for an appreciable length of time; that his death was instantaneous, and therefore no cause of action arose in his favor which could survive to his heirs or personal representative. If the ruling was correct, it is immaterial that an erroneous reason was advanced to justify it. (*City of Butte v. Goodwin*, 47 Mont. 155, Ann. Cas. 1914C, 1012, 134 Pac. 670.)

Whether death by drowning is instantaneous death within [2] the legal concept of the term is not a determining factor in this case. It was incumbent upon the plaintiff to make out a *prima facie* case of actionable negligence under the allegations of his complaint in favor of Leo Henroid in his lifetime and against the defendant, and in this he failed.

The complaint states the facts disclosing the representative capacity of plaintiff, the corporate character of the defendant and its ownership and operation of the natatorium, and alleges that on November 1, 1913, Leo Henroid applied for the privilege

of bathing, paid the required fee, secured a bathing suit, and was permitted by the defendant to go into the pool to bathe; that the water varied in depth from three feet to six feet; that the deceased was then about thirteen years of age, about four feet eight inches tall, unable to swim and unable to take care of himself in water over three feet deep, and that these facts were known to the defendant. The complaint also contains the following: "That the defendant carelessly and negligently permitted and allowed said Leo Henroid to so bathe in said plunge for a period of time of about two hours without any person being present to watch or look after the said Leo Henroid. That the said Leo Henroid, while bathing in said plunge as aforesaid, and through the carelessness and negligence of the defendant in failing and neglecting to have any person present to care for him, in some manner, unknown to this plaintiff, got into a portion of said plunge where the water was above his head, and was unable to get out by himself, and a large quantity of water got into his lungs and stomach and caused him to strangle and suffer great physical and mental pain and anguish, and caused him great physical injury, from which he died some ten or fifteen minutes thereafter."

Plaintiff's theory of the measure of defendant's duty is not made very plain in his complaint. If it can be construed to charge negligence in permitting the deceased to remain in the water an unreasonable time, the case fails, for there is no causal connection between such negligence and the injury. It could not be contended that drowning resulted from exhaustion occasioned by being in the water for an unreasonable time. There is not any evidence to suggest such a result.

If the complaint intends to charge negligence in failing to provide a personal attendant or life guard, based upon the assumption that Leo Henroid could not swim, the case likewise fails. An attendant at the plunge, called as a witness for the plaintiff, testified that he inquired of Henroid and his companion if they could swim, and by way of reply Henroid swam across the plunge and back without stopping, and said, "I

guess I can swim''; that the other boy then swam half across and back. There is some evidence, negative in character, which at first blush might seem to point to a contradiction of this, but if it is material to know whether the deceased could swim at the time he first entered the plunge, it would seem to be established that he could, or, at least, if the presence of a life guard was required only because he could not swim, the evidence fails to establish the necessity. The evidence concerning Leo Henroid's ability to swim was brought out on cross-examination, but on direct examination the witness was asked concerning instructions given him by the management, and this cross-examination did not exceed the limits set by section 8021, Revised Codes.

Plaintiff must have had some purpose, however, in alleging [3] that Leo Henroid could not swim and in attempting to prove the fact, and that this fact was known to defendant. It must have been the purpose of this allegation to fix the measure of defendant's duty in this particular instance. That duty is to be measured by the standard of ordinary care (*Phillips v. Butte etc. Fair Assn.*, 46 Mont. 338, 42 L. R. A. (n. s.) 1076, 127 Pac. 1011), and ordinary care is care proportionate to the risk to be apprehended and guarded against. (*Bourke v. Butte Electric & P. Co.*, 33 Mont. 267, 83 Pac. 470.) These rules are recognized by the authorities generally in cases of the like character as the one now under consideration. (*Turlington v. Tampa Electric Co.*, 62 Fla. 398, Ann. Cas. 1913D, 1213, 38 L. R. A. (n. s.) 72, 56 South. 696; *Flora v. Bimini Water Co.*, 161 Cal. 495, 119 Pac. 661; *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 116 Am. St. Rep. 818, 8 Ann. Cas. 977, 3 L. R. A. (n. s.) 982, 83 Pac. 686; *Brotherton v. Manhattan Beach I. Co.*, 48 Neb. 563, 58 Am. St. Rep. 709, 33 L. R. A. 598, 67 N. W. 479; *Id.*, 50 Neb. 214, 69 N. W. 757.)

Other things being equal, the defendant would owe a higher degree of care to the boy whom it knew could not swim, and who was permitted in the pool, than to one whom it knew could swim. In other words, the ability to swim or the lack of it would be an important factor in the sum of all the circum-

stances which determine what is and what is not ordinary care. We think this is the theory upon which the complaint proceeds—the theory upon which recovery is sought—and if the evidence tended to show that this defendant knew, or by the exercise of ordinary care should have known, that Leo Henroid could not swim, it might be conceded, for the purpose of this appeal, that a *prima facie* case would be made out; but there is not any evidence that defendant knew he could not swim, and the only knowledge brought home to it was conveyed by the exhibition of his ability to swim and his own statement. Plaintiff's evidence is that when Leo applied for the privilege of the pool, he was asked if he could swim and replied in the affirmative; that this inquiry was directed to him in pursuance of a rule of the defendant requiring it, and which denied the privileges of the natatorium to the minor who could not swim and who was unaccompanied by parent or guardian, so that, if it be [4] true, as plaintiff contends, that Leo Henroid could not swim, he secured admission by misrepresentation as to a material fact by reason whereof he became a trespasser *ab initio* (3 Thompson's Commentaries on the Law of Negligence, sec. 3323), to whom the defendant owed no duty other than to refrain from willfully or wantonly injuring him. (*Egan v. Montana C. Ry. Co.*, 24 Mont. 569, 63 Pac. 831.)

We are not called upon to determine whether the rule of ordinary care required the defendant to provide a life guard for the deceased without reference to his ability to swim. The complaint does not charge negligence in that particular, and the evidence offered by plaintiff in the direct examination of his witnesses discloses that his theory of liability in the instant case had its foundation in the assumption that the deceased could not swim, and because of that fact could not care for himself in water more than three feet deep. The burden was upon the plaintiff to show that the deceased was rightfully in the plunge, and that his death resulted proximately from a breach of duty which the defendant owed to him, and with which

it is charged in the complaint. In this he failed, and for this reason the judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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STATE EX REL. SELL, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,880.)

(Submitted June 5, 1916. Decided June 26, 1916.)

[158 Pac. 1018.]

*Certiorari—Return—Contents—District Judges—Disqualification—Fair Trial Law—Change of Venue—When Order Void.*

*Certiorari—Return—Contents.*

1. Under section 7206, Revised Codes, recitals, denials, affirmative allegations or matters not copied from the records, or matters copied from the records but not called for by the writ of review, are out of place in the return, do not constitute any part of it, and will be disregarded.

[As to questions reviewable upon *certiorari*, see note in 40 Am. St. Rep. 29.]

*District Judges—Fair Trial Law—Disqualification—Change of Venue—When Order Void.*

2. Under section 6315, as amended (Laws 1909, Chap. 114), a change of venue should not be ordered by a disqualified judge until after endeavor to secure another judge has failed, and then only pursuant to the provision of sections 6506 and 6507; hence an order of a district judge transferring a cause to another county, after an affidavit of disqualification had been filed against him, without observing the statutory requirements, was in excess of jurisdiction and void.

Original application for writ of review by the state, on the relation of Hattie Sell, against the District Court of the Tenth Judicial District in and for Fergus County and Roy E. Ayers, Judge thereof. Order annulled.

Mr. William Scallon and Mr. John A. Coleman, for Relator.

Messrs. Belden & De Kalb, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In an action pending in the district court of the tenth judicial district, numbered therein 5462, and entitled *Bank of Fergus County v. Herman Sell and Hattie Sell*, an affidavit imputing bias and prejudice to Honorable Roy E. Ayers, the presiding judge, was filed by the defendant Hattie Sell. The court, Judge Ayers presiding, thereupon made an order transferring the cause to Cascade county, and this proceeding was instituted to have that order annulled. A writ of review was issued and served. The paper presented as a return contains a copy of the order in question and certain recitals, one of which is that the venue was changed upon the request of the attorneys for the plaintiff.

The practice in a proceeding of this character has been settled [1] by statute in this jurisdiction for more than fifty years, and ought to be understood by this time. A provision in substantially the same terms as section 7206, Revised Codes, was enacted by the first territorial legislative assembly in 1864 (Bannack Statutes, p. 121, sec. 375), and has been in force ever since. By its terms the writ of review commands the party to whom it is directed to certify to the court issuing the writ "a transcript of the records and proceedings," so far as necessary to obtain the review sought. The return cannot comprehend more or less. Recitals, denials, affirmative allegations or matters not copied from the records, or matters copied from the records, but not called for by the writ, are out of place in the return, and do not constitute any part of it. (*State ex rel. First Trust & Savings Bank v. District Court*, 50 Mont. 259, 146 Pac. 539.) Disregarding, as we must, then, the recital above, and we have for consideration an order transferring a cause to another county, made by the court presided over by a judge disqualified for imputed bias or prejudice, and on the ground alone of such disqualification.

Section 6315, Revised Codes, as amended (Laws 1909, p. 161), [2] provides that, when an affidavit imputing bias or preju-

dice is filed, the judge as to whom such disqualification is averred shall be without authority to proceed further in the action, except to arrange the calendar, regulate the order of business, transfer the action to another court, or call in another judge to sit and act in such action. But this section, and sections 6506 and 6507, Revised Codes, are companion measures, and are to be construed together. (*State ex rel. Lohman v. District Court*, 49 Mont. 247, 141 Pac. 659.) When the affidavit imputing bias or prejudice was filed, a due consideration for the rights of the litigants should have prompted an immediate call upon another judge to preside in that case, and, if such invited judge failed to respond, another should have been called, unless a motion for change of venue was made pursuant to section 6506. When such a motion is made and the invited judge fails to appear and assume jurisdiction of the case within thirty days after the motion is filed, then an order for a change of venue may be made, provided the parties have been given an opportunity to agree upon another judge or a judge *pro tempore* and have failed. (Sec. 6506.) When the order for the change is to be made, the parties have the further right to an opportunity to agree upon the court to which the cause shall be transferred, and it is only after such opportunity has been accorded them and they have failed to agree that the court is authorized to make the change, and then only pursuant to the terms of section 6507. (*State ex rel. Carleton v. District Court*, 33 Mont. 138, 8 Ann. Cas. 752, 82 Pac. 789.) The court is altogether without authority to change the place of trial until a motion for such change has been made by a party to the action. (Sec. 6506; *State ex rel. Gnose v. District Court*, 30 Mont. 188, 75 Pac. 1109.) In other words, a change of venue is the last resort under the so-called "Fair Trial Law."

The order transferring cause No. 5462 to Cascade county, made by the court *sua sponte* and without observing the requirements of the statutes referred to above, was in excess of jurisdiction and is annulled.

*Order annulled.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. SELL, RELATOR, v. DISTRICT COURT ET  
AL., RESPONDENTS.

(No. 3,881.)

(Submitted June 5, 1916. Decided June 26, 1916.)

[158 Pac. 1020.]

(For syllabus, see *State ex rel. Sell v. District Court et al.*,  
*ante*, p. 457.)

Original application for writ of review by the State, on the relation of Hattie Sell, against the District Court of the Tenth Judicial District in and for Fergus County and John A. Matthews of the Fourteenth District, Judge presiding. Order annulled.

*Mr. William Scallon and Mr. John A. Coleman*, for Relator.

*Messrs. Belden & De Kalb*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In an action pending in the district court of Fergus county entitled *Hattie Sell v. Herman Sell* (No. 3385), an affidavit imputing bias and prejudice to Honorable John A. Matthews, the presiding judge, was made and filed by the plaintiff. It appearing that Honorable Roy E. Ayers, the duly elected judge of said county, had theretofore been disqualified in the same action, the court, Judge Matthews presiding, of its own motion, then and there made an order transferring cause 3385 to Cascade county, and this proceeding was instituted to have that order reviewed.

Upon the authority of *State ex rel. Sell v. District Court* (No. 3880), *ante*, p. 457, 158 Pac. 1018, the order is annulled.

*Order annulled.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.



NORTHERN PACIFIC RY. CO., RESPONDENT, v. BROGAN,  
COUNTY TREASURER, APPELLANT.

(No. 3,886.)

(Submitted May 29, 1916. Decided June 30, 1916.)

[158 Pac. 820.]

*Taxation—Railroads—Telegraph Lines—By Whom Assessable—  
Constitutional Law—Legislative Construction.**Taxation—Railroads—Telegraph Lines—By Whom Assessable.*

1. So much of a telegraph line used exclusively for railroad purposes and extending along the right of way across the state, as is within any given county is assessable by its assessor, and not by the state board of equalization as part of the "roadway," under the mandate of section 16, Article XII, Constitution, that term including only the bare strip of ground upon which the rails are laid.

*Constitutional Law—Legislative Construction.*

2. While the legislative construction of a constitutional provision is not conclusive, it is entitled to the most respectful consideration, particularly when it has been uniform and has extended over a considerable period of time, unchallenged in the courts.

*Appeal from District Court, Granite County; Geo. B. Winston, Judge.*

ACTION by the Northern Pacific Railway Company against T. N. Brogan as treasurer of Granite County. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Cause submitted on briefs of Counsel.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. Wm. H. Poorman*, Assistant Attorney General, for Appellant.

*Messrs. Gunn & Rasch*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At 12 o'clock noon of the first Monday of March, 1915, the Northern Pacific Railway Company, owned and operated a

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For authorities passing on the question of effect of different modes of assessment and procedure in taxation of corporations, see note in 60 L. E. A. 372.

telegraph line situated on and along its right of way across this state and extending through Granite county. Such telegraph line was an entity; was used exclusively for railroad purposes, and was a necessary adjunct to the secure and successful operation of the railroad. The county assessor of Granite county listed for assessment and taxation so much of the telegraph line as is within his county; the taxes were levied and extended, were paid under protest, and this action brought to recover back the amount. To the complaint, which sets forth the facts fully, a demurrer was interposed and overruled, and the defendant, refusing to answer further, suffered judgment to be entered against him, and appealed.

The case presents for determination the single question: Should so much of the telegraph line as is within Granite county [1] be assessed by the local assessor, or should the entire line be assessed by the state board of equalization as a part of the roadway of the railway company? The answer is to be found in the proper construction of the language of section 16, Article XII, of our state Constitution, to-wit: "All property shall be assessed in the manner prescribed by law except as is otherwise provided in this Constitution. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization and the same shall be apportioned to the counties, cities, towns, townships, and school districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities, towns, townships, and school districts."

At the time the Constitution was adopted, our revenue laws were found in Chapter 100, Fifth Division, Compiled Statutes of 1887 (secs. 1665-1795). For the purpose of taxation all railroad property was then divided into two classes. It was made the duty of the territorial board of equalization "to assess all the property in this territory belonging to railway corporations, except lots or parcels of real estate owned by the road in each county and improvements thereon, and except depots,

machine-shops, and other improved property connected with such road and located in any county, which shall be taxed in the county where situate." (Sec. 1675.) The same section provided further that in making its assessment the board "shall include the right of way, roadbed, bridges, culverts, rolling stock, and all other property exclusively used in the operation of such railway." Under these provisions it was the general rule that "railroad property" should be assessed by the territorial board of equalization, and it was the exception to that rule that certain enumerated property of a railroad company should be assessed by the county assessor. For reasons best known to themselves, the framers of our Constitution reversed this order and established the general rule that property shall be assessed locally, and the exception thereto that certain enumerated property shall be assessed by the state board of equalization. If it had been intended that all property of a railroad company operating in more than one county and necessary to the successful operation of its railroad should be assessed by the state board, and only its property which had a peculiarly local value should be assessed by the county assessor, no purpose could have been subserved in facing about upon the general plan which had been in force many years when the constitutional convention assembled. The very fact that the plan was completely reversed is most persuasive evidence of an intention to confine the state board to the assessment of only such property as was specifically enumerated without enlarging the meaning of the terms employed in the designation of such property.

The terms of section 16 above are mandatory and prohibitory. They are not to be contracted on the one hand nor expanded on the other. To express the intention of the framers of our Constitution would be to solve the difficulty before us. The debates of our constitutional convention are not available, and the meaning intended to be conveyed by the term "roadway," as employed in the section above, must be sought elsewhere. While a legislative construction of a constitutional provision [2] is not conclusive, it is entitled to the most respectful con-

sideration, particularly when it has been uniform and has extended over a considerable period of time, unchallenged in the courts. (*Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386.)

It is a part of the history of this commonwealth that the first state legislative assembly failed to organize or to enact any statutes; but the first opportunity which presented itself after the Constitution was adopted was seized upon to declare a legislative policy respecting the assessment of railroad property, and to that extent to interpret the language of section 16, Article XII. The second legislative assembly enacted an entirely new revenue measure. (Laws 1891, p. 73.) Section 11 of that Act provided: "The franchise, roadway, roadbed, rails and rolling stock of all railroads operating in more than one county in this state must be assessed by the state board of equalization, as hereinafter provided for."

Section 12: "All other taxable property must be assessed in the county, city, or district in which it is situated." By section 14 the county assessor was authorized to require from a railroad company, having property within his county, a list of "all depots, shops, station grounds, buildings, and other structures erected on the space covered by the right of way, and all other property owned by any person, corporation, or association of persons owning or operating any railroad within the county." Section 43 enumerated the items of information which a railroad company, operating in more than one county, was required to furnish to the state board of equalization. Section 44 provided for the annual meeting of the board, and then proceeded: "At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. All rolling stock, whether owned, leased, or conveyed, carrying passengers or freight, shall be assessed in the name of and against the company or corporation, leasing, using, or conveying such rolling stock. Assessment must be made to the corporation, person, or association of persons owning or leasing the same, and must be made upon

the entire railroad within the state, and must include the right of way, bridges, and culverts of the railroad. The depots, stations, shops, and buildings erected upon the space covered by the right of way, and all other property, owned or leased by such person, corporation, or association, except as above provided, are assessed by the assessor of the county wherein they are situate."

If the legislature correctly interpreted the language of section 16, above, the term "roadway" as used therein is synonymous with "right of way" when used to designate the bare strip of ground upon which the roadbed, rails and other necessary appliances of the road are laid or erected, and not as including any of the improvements upon or annexed to that strip. And that construction given in 1891, substantially contemporaneous with the initial application of the provisions of the Constitution to existing conditions, has never been abandoned or departed from. The terms of the Act of 1891, to which reference has been made, continued in force, were carried into the Codes of 1895 (Chap. 3, Tit. XII, Part III, Pol. Code), and are now found in the Revised Codes, sections 2502-2562.

For twenty-five years continuously, section 16, Article XII, has been construed to mean that only the naked roadway, with the franchise, roadbed, rails and rolling stock of a railroad operating in more than one county, may be assessed by the state board, while all other railroad property is subject to the general rule which provides for local assessment. If this long-continued and oft-reiterated policy has ever been challenged before the institution of this action, it has not been called to our attention, and, in the absence of such attack, the uniform construction given by a co-ordinate branch of government, throughout substantially the entire life of the state, is entitled to the most respectful consideration by this court.

As heretofore observed, this controversy hinges upon the proper scope of the meaning attached to the term "roadway," as employed in the Constitution above. Each of the other terms—franchise, roadbed, rails and rolling stock—has a well-

defined and well-understood meaning, and there is not any contention made that any one of them is sufficiently broad to include this telegraph line; but if we understand the position assumed by the respondent railway company, it is that the framers of our Constitution, in drafting section 16 above, employed the term "roadway" as synonymous with "right of way" in the broad sense as including not alone the strip of ground upon which the tracks, depots, shops and other improvements are situated, but as well such improvements upon that strip of land, or annexed thereto, as constitute a unit or one continuous property extending into or through more than one county and necessary to the use of, and actually used exclusively for, railroad business. There is also the argument advanced that the constitutional convention must have intended that property situate in more than one county which might fairly be considered as of substantially the same character and value throughout the entire extent, and therefore capable of assessment upon a mileage basis, should be assessed by the state board of equalization, and that the local assessor should be confined to the assessment of such property only as has a peculiarly local value. To the support of these contentions reference is made to certain decided cases:

In *Northern Pac. R. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134, it was held that the term "right of way" as used in the Act granting aid to the Northern Pacific Railroad Company (Act July 2, 1864, Chap. 217, 13 Stats. at Large, 367), included property used in constructing and operating the road and which had become annexed to the soil and a part of it, as well as the bare strip of land upon which the road was to be laid, and the same rule was observed in *Territory of New Mexico v. United States Trust Co.*, 172 U. S. 171, 43 L. Ed. 407, 19 Sup. Ct. Rep. 128. Assuming the correctness of the conclusion reached in each of these cases, it does not follow that the same meaning should be attached to the term "roadway" used in our Constitution.

In *Chicago, M. & St. P. Ry. Co. v. Cass County*, 8 N. D. 18, 76 N. W. 239, the court held that the term "roadway," used in the Constitution of North Dakota in the same connection as it is used in section 16 above, is synonymous with "right of way," and includes not only the strip of ground upon which the main line track is laid, but also the ground used for station purposes, for roundhouse, shops, sidings, spur tracks "and all other accommodations reasonably necessary to accomplish the object" of the railroad. Whether the observation of the court quoted above was pertinent to the question for decision is involved in doubt; but, acting upon it as authoritative, the same court, in *Minneapolis, St. P. & S. S. M. Ry. Co. v. Oppegard*, 18 N. D. 1, 118 N. W. 830, said: "It will not be disputed that a telegraph line, used exclusively for the moving of trains and the dispatching of railroad business, is not assessable independently or separately from the railroad property." Whatever this means, it is clearly *dictum*, for the property in controversy there was held to be used for commercial as well as for railroad purposes and to be assessable separately.

In *San Francisco etc. R. R. Co. v. Stockton*, 149 Cal. 83, 84 Pac. 771, the court was called upon to determine the meaning of the term "roadway" used in the Constitution of California in the same connection as the like term is used in our section 16 above, but with reference to parcels of land of considerable extent used for freight warehouse, roundhouse and stockyard purposes. The California court referred to the *Cass County Case* above, but declined to follow the North Dakota court, and gave to the term "roadway" a much narrower meaning. In the course of the opinion, it is said that the purpose of the constitutional convention in making an exception to the general rule of local taxation and conferring upon the state board of equalization the authority to assess certain railroad property "was to provide a more uniform and just method of valuing for taxation purposes what was designated by one of the members of the constitutional convention as the 'continuous property' of such railroads, the property which might fairly be con-

sidered as being substantially the same, both in quantity and in value, the whole length of the road and therefore capable of being valued at so much a mile."

With all due respect to these authorities, we are unable to follow them to the limits they have set or apply the doctrines which they enunciate to the facts of this case.

1. That the framers of our Constitution did not employ "roadway" as synonymous with "right of way," as that term was used in the railroad land grants, seems reasonably certain. If they had intended so broad a meaning, their use of the words "roadbed" and "rails" was purposeless, for each is a part of the right of way in the sense in which "right of way" is used in the congressional grants. From the very fact that they did thus particularize, we are led to believe that "roadway" was employed to designate the naked land used for right of way purposes. This appears to be the meaning given to the term when employed in the same connection, by the supreme court of California in *Railway Co. v. Stockton*, above, and by the supreme court of the United States in *Santa Clara Co. v. Southern Pac. Ry. Co.*, 118 U. S. 394, 30 L. Ed. 118, 6 Sup. Ct. Rep. 1132.

2. That the character of the property as necessary to the operation of the road was not a determining factor with the framers of our Constitution, in parceling out railroad property for the purpose of assessment, seems equally clear. It will scarcely be contended at this late day that depots, roundhouses, shops, coal-chutes, and the like property form a part of the roadway and are to be deemed included in the assessment made by the state board; and yet they are necessary—doubtless indispensable—accessories to the successful operation of a railroad. Not one of the terms employed in section 16 above is susceptible of a definition broad enough to include all the necessities of a railroad.

3. Neither did the framers of our Constitution consider as a determining factor the character of the property as a continuous whole of like value throughout its extent and capable of



fair valuation on a per mileage basis. If they had, other property would have been included in the class assessable by the state board.

It is a part of our history that long before the advent of the railroad into the territory of Montana, and more than twenty years before the constitutional convention assembled, the Western Union Telegraph Company was operating lines of telegraph through more than one county, and that, when the Constitution was written, the telegraph was a common means of communication between the different sections of the territory, and, though the telegraph lines are peculiarly that character of property to which the per mileage basis of assessment is applicable, no attempt was made to clothe the state board of equalization with the power or authority to assess such property, although at that time it was assessed upon a mileage basis exclusively. (Sec. 1675, Fifth Division, Comp. Stats. 1887.)

The Act of 1891 established a legislative policy which has been followed since. Section 30 provided: "Telegraph, telephone, and electric light lines, and similar improvements, and the franchises, and canals, ditches and flumes must be listed and assessed in the county in which such property is located." In section 29 of the same Act the legislative assembly took cognizance of the fact that a street railway might operate in more than one county, and made provision for the assessment of such property by the county assessors. These provisions have likewise continued in force to the present time. (Sec. 3718, Pol. Code 1895; sec. 2528, Rev. Codes.)

The association of the words "roadway," "roadbed," and "rolling stock"; the construction given them by the legislature throughout all the years since 1891 and unchallenged so far as we are advised; the exclusion from the class of property, assessable by the state board, of other property of the like character as that now under consideration; the change made in the policy which was pursued when the constitutional convention assembled, and the application of the rule of construction provided by the Constitution itself lead us to the conclusion that the

term "roadway," employed in section 16 above, does not include the telegraph line in question; that the assessment made by the assessor of Granite county was lawful, and the tax levied in pursuance thereof valid.

The judgment is reversed and the cause remanded, with directions to dismiss the action.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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STOKES, RESPONDENT, v. LONG, APPELLANT.

(No. 3,662.)

(Submitted May 12, 1916. Decided July 3, 1916.)

[159 Pac. 28.]

*Physicians and Surgeons—Malpractice—Complaint—Sufficiency—Liability for Improper Treatment—Evidence—X-ray Plates—Minimizing Damages—Duty of Plaintiff—Appeal and Error—Record—Harmless Error.*

Appeal and Error—Record—Judgment-roll.

1. If the record on appeal from an order denying a new trial, made upon the minutes of the court, contains certified copies of all the papers which go to make up the judgment-roll, it need not embody a copy of the latter authenticated as such.

Physicians and Surgeons—Malpractice—Complaint—Sufficiency.

2. A complaint stating that defendant physician, employed to treat plaintiff's broken leg, "failed to exercise ordinary care and skill," and so carelessly and negligently treated the fracture as to displace the bones, causing shortening of the leg and pain, suffering and damages, and alleging in traversable form the acts or omissions of defendant on which recovery is sought, showing they occurred through defendant's negligence, is sufficient.

[As to liability of surgeon for negligence and malpractice, see notes in 48 Am. Dec. 481; 93 Am. St. Rep. 657.]

Same—Trial—Nonsuit—Review of Evidence.

3. Where defendant introduces evidence after his motion for nonsuit is denied, the court, on appeal, will consider only the question whether the evidence as a whole made a case for the jury.

Same—*Prima Facie* Case—Evidence—Sufficiency.

4. Evidence in an action against a physician for malpractice in the treatment of a broken leg, held to have made a *prima facie* case for

the jury as to whether defendant exercised ordinary care and skill in selecting the means employed to produce a proper union.

**Same—Liability for Negligence of Recommended Physician.**

5. If one physician, upon leaving his home temporarily, recommends to his patients, in case of need, some other physician who is not in any sense in his employment nor associated with him as a copartner, he is not liable for injuries resulting from negligence or want of skill in the latter, the employment in such case being under an independent contract and he alone responsible for the result.

**Same—Liability for Negligence of Associated Physician.**

6. Where two physicians are employed on the same case and by agreement divide the service between them, and one observes and lets go on without objection wrongful acts and omissions by the other, or if the circumstances are such that he ought to have observed such wrongful acts or omissions, he is liable.

**Same.**

7. A physician who called in another to assist him in treating a broken leg, giving the latter exclusive charge only upon leaving the city for an extended stay, and requesting the patient to retain his half of the fee, was liable in damages where the treatment was vicious from the beginning.

**Same—Minimizing Damages—Duty of Plaintiff.**

8. Though one who has suffered a personal injury through the fault of another must use ordinary care and diligence to minimize the injurious consequences, he need not necessarily submit to a major operation, which may or may not result in a betterment of his condition; whether he has used such care is a question for the jury's decision.

**Same—Minimizing Damages—Cost of Operation—Evidence—Admissibility.**

9. Evidence of the cost of an operation that would minimize plaintiff's suffering due to a vicious union of a broken leg, at the time of the trial, was admissible in an action against the physician for damages.

(MR. CHIEF JUSTICE BRANTLY dissenting.)

**Same—Pain and Suffering—Limit of Recovery.**

10. In a personal injury action, plaintiff cannot recover compensation for future pain and suffering, and also the amount it would cost to obtain relief from it.

**Same—Evidence—Course of Treatment by Associated Physician.**

11. Evidence showing the course of treatment pursued by an associated physician for several weeks after defendant had left town, was competent to inform the jury that the course of treatment approved by defendant was continued without change, in order to rebut the notion that any efficient cause intervened by reason of anything such associated physician did upon his own initiative to bring about the condition in which plaintiff found himself at the conclusion of the treatment.

**Same—Evidence—Harmless Error.**

12. Admission of the evidence referred to in paragraph 11, *supra*, if error, was harmless where the jury were instructed to find for plaintiff only if his injury was suffered from defendant's acts or omissions before he left town.

**Harmless Error—Erroneous Instruction Favorable to Appellant.**

13. Appellant cannot complain of an instruction, even though incorrect, which was as favorable to him as he could ask.

**Physicians and Surgeons—X-ray Plates—Evidence—Admissibility.**

14. X-ray plates—like photographs—if testified to as correct, are competent evidence to prove a condition which can be shown by such a representation; hence such plates showing the condition of plaintiff's

leg at time of trial, were competent, they having been taken by practicing physicians who showed that they understood and were accustomed to the use of X-ray process in their practice, and possessed the required skill and knowledge to use it with accurate results.

**Appeal—Error in Instructions—Duty of Appellant.**

15. On motion for new trial, neither the district nor the supreme court on appeal can consider any error in instructions not specifically pointed out at the time of settlement thereof.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by Frank H. Stokes against W. A. Long. From a judgment for plaintiff and an order denying him a new trial, defendant appeals. Affirmed.

*Messrs. Norris & Hurd*, for Appellant, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

To allege that appellant failed to exercise ordinary care and skill in the performance of his duty; failed to use reasonable care and diligence in the exercise of his skill as a physician and treated the fracture of respondent's leg in a grossly careless, negligent and improper manner, are allegations of bald conclusions of law. (*Pullen v. City of Butte*, 38 Mont. 194, 21 L. R. A. (n. s.) 42, 99 Pac. 290; *McPherson v. Pacific Bridge Co.*, 20 Or. 486, 26 Pac. 560; *Woodward v. Oregon Ry. & Nav. Co.*, 18 Or. 289, 22 Pac. 1076; *Chicago, B. & Q. Ry. Co. v. Harwood*, 90 Ill. 425; *Jeffersonville etc. Ry. Co. v. Dunlap*, 29 Ind. 426; *Pittsburgh etc. Ry. Co. v. Peck*, 165 Ind. 537, 76 N. E. 163.) In *Merriam v. Hamilton*, 64 Or. 476, 130 Pac. 406, the court held that a complaint attempting to charge negligence of a physician in substantially the same language as that set forth in the complaint in the case at bar did not state a cause of action.

The employment of Dr. Wallin by the respondent constituted an independent contract. (*Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, 30 L. R. A. 345, 33 Atl. 389; *Hitchcock v. Burgett*, 38 Mich. 501; *Morey v. Thybo*, 199 Fed. 760, 118 C. C. A. 198.)

And this is true even though the employment of Wallin was made upon the recommendation of the appellant.

Where two physicians, having no business connections are employed on the same case, they are considered as independent agents, and each is responsible for his own negligence and no more. (*Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, 30 L. R. A. 345, 33 Atl. 389; *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Robinson v. Crotwell*, 175 Ala. 194, 57 South. 23; *Brown v. Bennett*, 157 Mich. 654, 122 N. W. 305; *Morey v. Thybo*, 199 Fed. 760, 118 C. C. A. 198.) So it is held that where one physician is called in by the patient or the attending physician to take the latter's place, either temporarily or permanently, the physician called in is alone responsible for any injury to the patient caused by his lack of care or skill. (*Tomer v. Aiken*, 126 Iowa, 114, 101 N. W. 769; *MacKenzie v. Carman*, 103 App. Div. 246, 92 N. Y. Supp. 1063; *Hawthorne v. Richmond*, 48 Vt. 557; *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, 30 L. R. A. 345, 33 Atl. 389; *Hitchcock v. Burgett*, 38 Mich. 501; *Laugher v. Pointer*, 5 Barn. & C. 547, 108 Eng. Reprint, 204; *De Forrest v. Wright*, 2 Mich. 368; Wood on Master and Servant, sec. 311.)

To create any liability on the part of the appellant for the lack of skill and care of the other physician, which resulted in injury to the respondent, it must appear that Dr. Wallin was under the appellant's dominion and control, or, in other words, that the relation of principal and agent existed. (*Baker v. Wentworth*, 155 Mass. 338, 29 N. E. 589; *Harris v. Fall*, 177 Fed. 79, 27 L. R. A. (n. s.) 1174, 100 C. C. A. 497; *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S. W. 450; *Reynolds v. Smith*, 148 Iowa, 264, 127 N. W. 192; *Broz v. Omaha etc. Hospital Assn.*, 96 Neb. 648, L. R. A. 1915D, 334, 148 N. W. 575; *Hunner v. Stevenson*, 122 Md. 40, 89 Atl. 418; *Stewart v. Manasses*, 244 Pa. St. 221, 90 Atl. 574; *Tish v. Welker*, 7 Ohio N. P. 472; *Lawson v. Crane*, 83 Vt. 115, 74 Atl. 641; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696; *Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 333). Even though appellant on his own respon-

sibility had employed Dr. Wallin, appellant would not have been responsible for any acts of negligence of Dr. Wallin. (*Hitchcock v. Burgett*, *supra*; *Myers v. Holborn*, *supra*; *Laughter v. Pointer*, 5 Barn. & C. 547, 108 Eng. Reprint, 204; *Robinson v. Crotwell*, 175 Ala. 194, 57 South. 23.)

No evidence was offered by respondent to the effect that as the result of appellant's acts, the damages to respondent occurred, but the theory of respondent's case was that his damages were the result of the negligent acts of both appellant and Dr. Wallin. Under this evidence it is clear that any negligence on the part of Dr. Wallin, if any there was, constituted an intervening cause, and hence such evidence as was offered as to Dr. Wallin's treatment of the case was not competent or relevant to the issues in this case. Any intervening cause would break the causal connection between the negligence of appellant and the injuries of respondent, and would relieve appellant of liability. And it would be immaterial whether such intervening cause were the direct and positive acts of Dr. Wallin or otherwise. (29 Cyc. 488; 1 Thompson on Negligence, sec. 55; *Ewing v. Good*, 78 Fed. 442; *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48; *Link v. Sheldon*, 18 N. Y. Supp. 815.)

The X-ray plates were objected to for the reason that no legal foundation therefor had been laid and that they were not material to any issue in the case. They were not shown to be correct representations of what they purported to represent, and should have been excluded. (Wigmore on Evidence, secs. 790-797; *Ligon v. Allen*, 157 Ky. 101, 51 L. R. A. (n. s.) 842, 162 S. W. 536; *Louisville & N. Ry. Co. v. Brown*, 127 Ky. 732, 13 L. R. A. (n. s.) 1135, 106 S. W. 795; *Higgs v. Minneapolis etc. Co.*, 16 N. D. 446, 15 Ann. Cas. 97, 15 L. R. A. (n. s.) 1089, 114 N. W. 722; *Dederich v. Salt Lake etc. Ry. Co.*, 14 Utah, 137, 35 L. R. A. 802, 46 Pac. 656; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.)

The error made in instruction No. 3 consists in the failure to define the negligent, careless and unskillful treatment referred to, and in informing the jury that the law implied a promise

and duty on the part of appellant to use reasonable skill, *etc.*, whereas the correct rule is that the law implies no other promise or duty on the part of a physician than to use such ordinary skill and reasonable diligence in and about a treatment of a patient as is ordinarily used by the average of the medical profession in the same and similar communities. (22 Am. & Eng. Ency. of Law, 799, 801; 30 Cyc. 1570, 1572; *McDonald v. Harris*, 131 Ala. 359, 31 South. 548; *Pike v. Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 665, 49 N. E. 760; *State v. Housekeeper*, 70 Md. 162, 14 Am. St. Rep. 340, 2 L. R. A. 587, 16 Atl. 382; *Smith v. Overby*, 30 Ga. 241; *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252; *McNevins v. Lowe*, 40 Ill. 209.)

*Mr. O. W. McConnell* and *Mr. John A. Coleman*, for Respondent, submitted an original and supplemental brief; *Mr. McConnell* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action plaintiff recovered a judgment against defendant, a physician and surgeon, for alleged malpractice in the reduction and treatment of a broken leg. The defendant has appealed from the judgment and an order denying his motion for a new trial. The appeals were taken separately, and appear upon the records of this court under different numbers, but they were argued and submitted, and will be determined as if taken at the same time.

The motion for a new trial was made upon the minutes of the court. After the defendant had filed his brief in this court, counsel for plaintiff filed a motion, asking this court to strike from the files the record on appeal from the order denying the motion for a new trial, and to dismiss the appeal, alleging that the district court was without jurisdiction to settle the statement on appeal because it, together with amendments proposed by counsel for the plaintiff, had not been presented to the trial court within the time and in the manner prescribed by the pro-

vision of the statute. The motion included also a demand for a dismissal of the appeal on the ground that the record does not contain a copy of the judgment-roll. The motion was denied, with leave to counsel to renew it at the hearing, which they did. The record discloses that during the proceedings leading up to the settlement of the statement, irregularities intervened. We shall not take the time to discuss them in detail. It is sufficient to say that counsel for the plaintiff, by pursuing the course they did, waived these irregularities, and cannot now insist that the [1] court was in error in disregarding them. The record on the appeal from the order denying the new trial does not contain a copy of the judgment-roll authenticated as such. It does contain, however, certified copies of all the papers which go to make it up. This sufficiently meets all requirements. (Rev. Codes, sec. 6799; *Doornbos v. Thomas*, 50 Mont. 370, 147 Pac. 277.) The motion to dismiss is therefore denied.

On the merits it is argued with much earnestness that the [2] complaint does not state a cause of action, and hence does not support the judgment. It alleges that defendant was a physician and surgeon; that on November 25, 1913, plaintiff had the thigh bone of his left leg broken, and that he employed the defendant, in his professional capacity as such physician and surgeon, to reduce the fractured bone to its proper position and place and to attend to and cure the same. It is then alleged: "That the defendant accepted and entered upon such employment on the said twenty-fifth day of November, 1913, but wholly failed to exercise ordinary care and skill in the performance of his duty, and wholly failed to use reasonable care and diligence in the exercise of his skill as such physician and surgeon, and did then and there treat the fracture of said leg in a grossly careless, negligent, unskillful and improper manner, so that the bones of said leg were displaced and out of their natural state, position and condition, thereby causing the plaintiff's leg to be shortened several inches, causing great bodily and mental pain and suffering, which said pain and suffering still continues, whereby the plaintiff has been, and is now, greatly and perma-



nently injured, to his damage in the sum of \$25,000." The paragraphs following contain allegations charging that because of said negligent conduct of defendant, plaintiff's earning capacity has been entirely destroyed for a long time to come, to his damage in the sum of \$5,000, and that he has suffered damage further in the sum of \$1,500, which he will be compelled to pay for an operation and treatment by competent physicians and surgeons, in order to have the condition of his leg ameliorated and to gain relief from the pain now suffered by him.

It is said that the allegations found in the paragraph quoted are mere bald conclusions of law, and hence that the pleading does not meet the requirements of section 6532 of the Revised Codes, in that it does not contain "a statement of the facts constituting the cause of action in ordinary and concise language." In other words, it does not aver the specific act or omission of defendant upon which plaintiff bases his right to recover. The pleading is not a model, but we think it states facts sufficient to save it from condemnation. The paragraph made the subject of defendant's attack does not state very fully or specifically the facts constituting the omission of duty by defendant. It does state, however, that defendant so treated plaintiff's injury "that the bones of said leg were displaced, \* \* \* thereby causing plaintiff's leg to be shortened several inches." This, with the qualifying terms employed, we think sufficiently informed defendant upon what plaintiff would rely for a recovery. It means, if anything, that defendant's treatment was such that the fragments of the bone of plaintiff's leg were not retained in apposition, with the result that the leg became shortened, whereas the acceptance of the employment imposed upon defendant the duty to exercise reasonable care and skill to prevent such a result, which the defendant failed to do. It does not matter that the qualifying terms imputing negligence precede or follow the omission of duty charged, or that they are employed at all, if the direct averments of the complaint necessarily raise the presumption of negligence. It is sufficient to meet all requirements if the pleader sets out in traversable form

the acts or omissions of the defendant upon which he seeks recovery, and shows that they occurred through the negligence of the defendant. This, we think, the complaint here does. (6 Thompson on Negligence, sec. 7447; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47, 9 South. 252; *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *City of Geneva v. Burnett*, 65 Neb. 464, 101 Am. St. Rep. 628, 58 L. R. A. 287, 91 N. W. 275; *Consumers' Elec. L. etc. Co. v. Pryor*, 44 Fla. 354, 32 South. 797; *Hanselman v. Carstens*, 60 Mich. 187, 27 N. W. 18.) This statement is in full harmony with the rule announced by this court in *County of Silver Bow v. Davies*, 40 Mont. 418, 107 Pac. 81; *Gauss v. Trump*, 48 Mont. 92, 135 Pac. 910; *Willoburn Ranch Co. v. Yegen*, 49 Mont. 101, 140 Pac. 231, and other cases—that, as against an attack for lack of substance, whatever is necessarily implied or reasonably to be inferred from an allegation in a pleading is to be taken as directly averred.

It is contended that there was no substantial evidence introduced by the plaintiff showing negligence by defendant or connecting him with the injury suffered by plaintiff, and hence the [3] court should have sustained defendant's motion for nonsuit and for a directed verdict. Inasmuch as the defendant introduced evidence after the motion for nonsuit was denied, we shall consider only the question whether the evidence as a whole made a case which should have been submitted to the jury. (*Van Vranken v. Granite County*, 35 Mont. 427, 90 Pac. 164; *Yergy v. Helena L. & Ry. Co.*, 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310.) The evidence is quite voluminous and cannot be recapitulated *in extenso*. Nor do we deem it necessary to discuss in detail the portions of it in which the various expert witnesses expressed their personal views as to the merits or demerits of the particular mode of treatment or mechanical appliances which ought to be pursued in such cases. After a careful study of it, we have concluded that it presents a case calling for the judgment of the jury.

In the forenoon of November 25, 1913, the plaintiff was preparing to move a steam threshing machine. While back-

ing the engine in order to couple it with the separator, he inadvertently permitted the former to back too far. In the resulting collision he was caught by the engine and suffered a transverse fracture of the upper third of the femur of his left leg. The skin and muscles of the leg on the inner side were also considerably lacerated. The plaintiff was put into a wagon and taken for treatment to Lewistown, about ten miles away, where defendant resided. Plaintiff's wife, at his direction, went forward to engage defendant's services. He had theretofore been employed by plaintiff. In case she could not find defendant, she was to employ Dr. Wallin. Finding the defendant in his office, she told him of the accident, and that plaintiff desired his services. He agreed to serve plaintiff. He instructed her to engage a room and nurse at a hospital. He also told her that he would need assistance, and suggested that he secure the services of Dr. Wallin. To this she agreed. When plaintiff arrived at the hospital, at about 4 o'clock in the afternoon, defendant and Dr. Wallin were both present. The two proceeded at once to reduce the fracture and to apply such devices as they deemed necessary and proper to secure immobility of the leg and to maintain the parts of the bone in apposition, first cleansing and stitching up the superficial wound. The defendant administered the anesthetic. Dr. Wallin performed the operation and applied the mechanical devices which he deemed necessary. No one other than the two physicians witnessed the operation. When it had been completed, plaintiff was removed from the operating-room and put in bed, where he remained for five weeks. At the time of the trial it was not controverted—at least there was evidence tending to show—that the parts of the bone had not been kept in apposition, but had been permitted to slip by each other, the result being a vicious union with a shortening of the leg to the extent of two inches, rendering the use of it painful.

There is much conflict in the evidence as to the course of treatment pursued from the time the fracture was reduced until plaintiff was permitted to leave the hospital, which he did at the end of the sixth week. The plaintiff, his wife, and other

lay witnesses testified at length as to the appliances used and the attention given plaintiff. This testimony described the course of treatment as follows: When plaintiff returned to consciousness, his leg was inclosed in a plaster of paris cast without any opening. He was then in bed in a horizontal position, with a weight of four and three-quarter pounds attached to his foot by means of a cord held by strips of surgeon plaster adhering to the leg. The cord passed over a pulley at the foot of the bed, and held the weight suspended. He was kept in this position until he left the hospital. No means were employed such as the elevation of the foot of the bed to prevent his body slipping down in the bed, as it yielded to the pull of the weight. No examinations were made by means of the X-ray process, nor were the usual necessary superficial measurements made from day to day. No examination could be made by manipulation because the cast prevented. Several physicians, who either heard this testimony or had it submitted to them in the form of hypothetical questions, expressed the opinion that the treatment was vicious, in that it was not such as reasonable knowledge of the surgical art and ordinary care and skill in its practice require. The vice of it, in their opinion, lay in these omissions: To use a much heavier weight—from twelve to twenty pounds or more—to keep the muscles of the leg in a state of relaxation; to elevate the foot of the bed in order to have plaintiff's body serve as a counterweight, and thus keep the muscles relaxed in order to maintain apposition; to measure the limb from day to day, to be assured that apposition was being maintained; and, in view of the fact that the limb was inclosed in a cast, to use the X-ray process for the same purpose. Some of these witnesses expressed the opinion that, considering the inadequacy of the appliances used, and assuming that apposition was secured when reduction had been effected, that condition could not have continued for more than a few hours afterward. In our view, this evidence made a *prima facie* case for the jury as to whether ordinary care and skill had been exercised in selecting the means employed to produce a proper union.

The defendant and Dr. Wallin both detailed the course of treatment which they claim to have pursued. If their testimony were to be accepted as true, plaintiff had no case; for, as detailed by them, the course pursued was in every particular beyond criticism even in the opinion of plaintiff's expert witnesses. Even so, the evidence as a whole presented a question as to whether, in view of the result, their testimony was true, and this question was exclusively for the jury. But counsel contend that the evidence shows without contradiction that Dr. Wallin reduced the fracture and chose the mechanical appliances which were used, the defendant administering the anesthetic only; that the defendant left Lewistown for Florida on November 30 and spent the winter there; that during the days intervening between November 25 and the latter date, the defendant took no part in the treatment of the injury, and hence that Dr. Wallin was solely responsible, so that, if plaintiff suffered wrong at the hands of anyone, it was by reason of the negligence of Dr. Wallin. In other words, since defendant was authorized by plaintiff to employ Dr. Wallin and he performed the operation of reduction and thereafter treated the plaintiff exclusively, Dr. Wallin's employment constituted an independent contract, under which he became solely responsible to plaintiff. If the evidence were in the condition which counsel assert, their conclusion would undoubtedly be correct. If [5] one physician, upon leaving temporarily the community in which he is engaged in practice, recommends to his patients the employment, in case of need, of some other physician who is not in any sense in his employment nor associated with him as a copartner, he is not liable for injuries resulting from negligence or want of skill in the latter, in case he is employed. In such case the employment of the latter is under an independent contract, and he is solely responsible for the result. (*Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, 30 L. R. A. 345, 33 Atl. 389; *Hitchcock v. Burgett*, 38 Mich. 501; 5 Thompson on Negligence, sec. 6723; 22 Am. & Eng. Ency. of Law, 2d ed., 805;

30 Cyc. 1581; 3 Wharton & Stille's Medical Jurisprudence, sec. 502.) In the section cited from Thompson on Negligence, *supra*, the rule is stated thus: "A physician or surgeon is not liable for the negligence of another practitioner whom he recommends or sends in his place when he is unable to attend the patient, and whose services are continued under an independent contract, since no relation of agency or employment exists between the physicians." It is held also that where two physicians [6] are employed on the same case and by agreement divide the service as their best judgment may dictate, they are considered as independent agents, each being responsible for his own negligence and no more. (*Morey v. Thybo*, 199 Fed. 760, 42 L. R. A. (n. s.) 785, 118 C. C. A. 198.) If, however, one observes and lets go on without objection wrongful acts and omissions by the other, or if the circumstances are such that he ought to have observed such wrongful acts or omissions, he is liable. Each is bound to bring to the case the ordinary knowledge and skill of the profession, and also to give his best personal attention and care. If one is guilty of want of ordinary professional care and skill in choosing the mode of treatment adopted, and the other expressly or impliedly gives his approval, there is no reason apparent why the latter should not be held guilty also, for by his acquiescence he fails to give the care and attention which his employment requires. (*Morey v. Thybo*, *supra*.)

The evidence does not justify the position of counsel. Dr. [7] Wallin was employed, in the first place, to assist the defendant. Though the defendant insisted in his testimony that he told plaintiff's wife that he could not take charge of the case because he was about to leave for Florida, and suggested calling Dr. Wallin, the evidence justifies the conclusion that he considered the case as his own, and had Dr. Wallin called merely to assist him in reducing the fracture, with the purpose of having him take exclusive charge of the case only after he had left. This is indicated by the fact that he continued to visit the plaintiff daily from November 25 to November 30,

inclusive, making such examinations of the injury and such inquiries touching the plaintiff's general condition as were made, generally accompanied by Dr. Wallin who, however, did nothing other than to lend his presence; and also the fact that some weeks after he had gone he wrote the plaintiff, requesting him to retain his half of the fee. There was testimony to the effect that the treatment was vicious from the start, in that Dr. Wallin had not made use of what is known among physicians and surgeons as "Buck's Extension," or other adequate appliance to preserve apposition of the parts of the bone, and continued so until the plaintiff left the hospital. If this was so—and whether it was, was a question for the jury—the defendant cannot be held blameless for the omissions and wrongful acts of Dr. Wallin in failing to use adequate appliances so long as he was in attendance. Indeed, by his acceptance of the situation as it was at the completion of the operation and permitting it to continue for the five days during which he was in attendance, he approved Dr. Wallin's method and adopted it as his own; and, as the evidence tends to show this, and that no change in treatment was thereafter made, the conclusion seems inevitable that both are to be deemed responsible for the result, the evidence suggesting no other effective cause to which it might be attributed, but, on the contrary, tending to show that the vicious result was due wholly to the inadequacy of the appliance made use of at the time the fracture was reduced and kept in use thereafter.

The court admitted evidence showing what would be the cost of an operation which would minimize the suffering due to plaintiff's condition at the time of the trial. Defendant objected to it at the time, and subsequently moved the court to strike it from the record. The court overruled the objection and denied the motion. There was no error. The general rule is that one who has suffered an injury through the fault of another must use ordinary care and diligence to minimize the injurious consequences. (*Allen v. Bear Creek C. Co.*, 43 Mont. 269, 115 Pac. 673; *Tiggerman v. City of Butte*, 44

Mont. 138, 119 Pac. 477.) When the injury is bodily he is not necessarily bound to submit to a major surgical operation, which may or may not result in a betterment of his condition. (*Freeman v. Chicago etc. Ry. Co.*, 52 Mont. 1, 154 Pac. 912.) But it is always a subject of inquiry by the jury, under the circumstances disclosed by the evidence in the particular case, whether or not the plaintiff has met the requirement of the rule. By offering the evidence in question, plaintiff signified his intention to submit to the operation, and, assuming that it would bring him relief from future pain and suffering, to relieve the defendant *pro tanto* from the amount of damages for which he would otherwise be liable; or, to make the statement in a different way, assuming it to be his duty to minimize, so far as he might, the damage resulting from his injury, he, in effect, tendered to the defendant a credit of the amount which the operation would cost, upon the amount the jury might award him in the condition in which he was at the time of the trial. This he had a right to do if he chose. By requesting instructions so framed as to inform the jury of the use they should make of the evidence, the defendant would have gained the advantage to which he would have been entitled had he himself introduced the same evidence in connection with other facts and circumstances sufficient to convince the jury that the plaintiff in the exercise of ordinary diligence and care ought to have submitted to the operation. Plaintiff could not, under [10] any view, recover compensation for future pain and suffering and also the amount it would cost to obtain relief from it.

Evidence was admitted showing the course of treatment pursued by Dr. Wallin subsequent to November 30 and up to the time plaintiff left the hospital. It is urged that this was error. Counsel say that whatever blame may attach to defendant for his wrongful acts and omissions during his attendance upon plaintiff, he cannot be held liable for any act or omission of Dr. Wallin after his attendance ceased. Let this be conceded. There was no error, for two reasons: In the first



place, it was competent to inform the jury that the course of treatment approved by defendant was continued without change by Dr. Wallin, in order to rebut the notion that any efficient cause intervened by reason of anything he did upon his own initiative to bring about the condition in which plaintiff found himself when he left the hospital. In the second place, the [12] court instructed the jury in terms that, before they could find a verdict for the plaintiff, they must find that the injury suffered by him was by the wrongful acts or omissions of the defendant prior to his leaving for Florida, on November 30. This effectively excluded from the consideration of the jury, as a foundation for a verdict, anything done by Dr. Wallin [13] after that date. Whether the instruction was correct or not, the defendant cannot complain of it, because it was as favorable to him as he could ask.

During the trial the court submitted to the jury for inspection, [14] over defendant's objection, X-ray plates showing the condition of the bone in plaintiff's leg at the time of the trial. It is now argued that this was error because they were not shown to be correct. There is no merit in the contention. It cannot be questioned that a photograph is competent evidence to prove a condition which can be shown by a representation of that sort. (*State v. Jones*, 48 Mont. 505, 139 Pac. 441; Wigmore on Evidence, sec. 790.) It stands upon the same footing as a map, plan or model, and, when shown by a competent witness to be correct (*State v. Jones, supra*), furnishes evidence of a high order of accuracy. (*Beardslee v. Columbia Twp.*, 188 Pa. 496, 68 Am. St. Rep. 883, 41 Atl. 617.) A plate or photograph taken by the X-ray process must be assigned to the same category. If, for illustration, it appears from the testimony of the person who took the picture that he possesses the knowledge, skill and experience necessary to enable him to take such pictures accurately, and that the one in question is a fair representation of the situation or condition which is the subject of inquiry, it becomes competent to show that condition. In this case, the witnesses who took the plates were

both practicing physicians. Upon being questioned, they showed that they understood, and were accustomed to the use of, the process in their practice and possessed the required skill and knowledge to enable them to use it with accurate results.

Much criticism is made of the action of the court in refusing to submit requested instructions and in overruling objections to some of those submitted. An examination of the refused instructions and of the charge as a whole requires the conclusion that the defendant has no cause for complaint. The offered instructions, so far as they embody correct statements of the law applicable to the case, were covered substantially by those submitted. In some instances the specific objections made by counsel to particular instructions are other than [15] those made in the lower court. That court was precluded from granting a new trial for error in any of the instructions not specifically pointed out at the time of settlement. So this court cannot consider any error not specifically pointed out to the trial court. (Rev. Codes, sec. 6746.) We think the charge as a whole covered all the issues in the case, and was as fair to the defendant as he could demand.

The foregoing discussion expresses the views of all the members of the court on each point noticed, except that relating to the evidence showing the cost of a surgical operation to relieve the plaintiff. I do not concur in the conclusion stated in this behalf. In my opinion, the purpose of plaintiff in introducing the evidence was to enable him to recover the cost of the operation as special damages, in addition to the amount claimed as general damages. That this is so is indicated by the allegations in the complaint and the instructions framed upon the same theory, requested by plaintiff and submitted to the jury. Certainly, if the purpose of plaintiff had been to mitigate the damages *pro tanto*, there could be no question as to the propriety of the court's ruling. Considering, however, the theory of the case as disclosed by the complaint and upon which it seems apparent the evidence was offered, I think the ruling erroneous. I therefore think that the defendant should

be awarded a new trial unless the plaintiff should be willing to have the judgment modified by subtracting from the amount of the award by the jury the greatest amount any witness fixed as the cost of the operation, and that the cause should be remanded to the district court, with directions that plaintiff be permitted to exercise this option.

The judgment and order are affirmed.

*'Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER CONCUR.

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STATE, APPELLANT, v. ROCKY MOUNTAIN ELEVATOR CO., RESPONDENT.

(No. 3,773.)

(Submitted June 22, 1916. Decided July 6, 1916.)

[158 Pac. 818.]

*Criminal Law—Monopolies—Unfair Discrimination—Buying Commodities—Evidence—Insufficiency—Appeal and Error—Presumptions—Right Result—Wrong Reason—Constitutional Law—Validity of Statute—Review.*

Appeal and Error—Presumptions.

1. In entering upon its investigation of an appeal, the supreme court indulges the presumption that the ruling of the trial court is correct; and if its order directing a verdict of not guilty can be justified upon any ground, it will be upheld.

Same—Right Result—Wrong Reason.

2. If the right result was reached by the trial court, it is immaterial that an erroneous reason was assigned for it.

Constitutional Law—Review—Validity of Statute.

3. The validity of a statute will not be determined on appeal unless such determination is necessary to a decision of the particular case.

[As to caution of courts in respect to declaring legislative Acts to be invalid, see note in 48 AM. DEC. 269.]

Criminal Law—Unfair Discrimination—Buying Commodities—Evidence—Insufficiency.

4. Evidence in a prosecution for unfair discrimination in buying wheat, contrary to the provisions of Chapter 8, Laws of 1913, held insufficient for a conviction of defendant; the court's order in directing a verdict of acquittal was therefore correct.

*Appeal from District Court, Teton County; J. B. Leslie, Judge.*

CRIMINAL PROCEEDINGS by the State against the Rocky Mountain Elevator Company for unfair discrimination under Chapter 8, Laws of 1913. From an order directing a verdict of not guilty, the State appeals. Affirmed.

*Mr. J. B. Poindexter*, Attorney General, *Messrs. Norris & Hurd* and *Mr. Phil. I. Cole*, for Appellant, submitted a brief; *Mr. Chas. S. Wagner*, Assistant Attorney General, argued the cause orally.

The information does not state facts sufficient to charge the defendant with an offense against the laws of the state of Montana.

The offense with which the defendant is charged is purely statutory. Nothing like it was known at the common law. Under such circumstances the statute contains all the elements of the offense necessary to be charged in the indictment. So it is held that an indictment or information for a statutory offense which charges the defendant with the commission of such offense in the language of the statute is sufficient. (*State v. Brown*, 38 Mont. 309, 99 Pac. 954; *Commonwealth v. Dewhirst*, 190 Mass. 293, 76 N. E. 1052; *State v. Johnson*, 93 Mo. 317, 6 S. W. 77; *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141; *Bartley v. State*, 53 Neb. 310, 73 N. W. 744; *Bolen v. People*, 184 Ill. 338, 56 N. E. 408; *People v. Corbalis*, 86 App. Div. 531, 83 N. Y. Supp. 782; *Latshaw v. State*, 156 Ind. 194, 59 N. E. 471; *Johnson v. State* (Tex.), 55 S. W. 818; *State v. Reilly*, 108 Iowa, 735, 78 N. W. 680; *State v. Pennington*, 41 W. Va. 599, 23 S. E. 918; *State v. Seeley*, 65 Kan. 185, 69 Pac. 163; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *State v. Sonier*, 107 La. 794, 32 South. 175; *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022.) So it has been held that where the words of an anti-trust statute are descriptive of the offense, which is purely a statutory one, an indictment which follows

the language of the statute is sufficient. (*Commonwealth v. Grinstead*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471.) It is sufficient, moreover, if the offense is set forth substantially though not in the exact words of the statute. (Sec. 9155, Rev. Codes; *Territory v. Corbett*, 3 Mont. 50; *State v. Conway*, 38 Mont. 42, 98 Pac. 654; *Smith v. State*, 72 Neb. 345, 100 N. W. 806; *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471; *Chandler v. State*, 141 Ind. 106, 39 N. E. 444; *Schley v. State*, 48 Fla. 53, 37 South. 518; *Smith v. Territory*, 11 Okl. 656, 69 Pac. 803.)

In the second ground of its motion for a directed verdict defendant objects to Chapter 8, Laws of 1913, for the reason that it contains the same wording as Chapter 7 in regard to the equalization of the distance and freight rates. Chapter 7 deals with selling and Chapter 8 with buying, and is incapable of legal construction and therefore void. Statutes similar to Chapter 7, are found in Minnesota, Nebraska and South Dakota, and have been held valid in those states. (*State v. Drayton*, 82 Neb. 254, 130 Am. St. Rep. 671, 23 L. R. A. (n. s.) 287, 117 N. W. 768; *State v. Central Lumber Co.*, 24 S. D. 136, 42 L. R. A. (n. s.) 804, 123 N. W. 504; *State v. Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527; *State v. Bridgman & Russell Co.*, 117 Minn. 186, Ann. Cas. 1913D, 41, 134 N. W. 496; *Central L. Co. v. South Dakota*, 226 U. S. 157, 57 L. Ed. 164, 33 Sup. Ct. Rep. 66.) A statute similar to Chapter 8 is found in Iowa, and in the case of *State v. Fairmont Creamery Co.*, 153 Iowa, 702, 42 L. R. A. (n. s.) 821, 133 N. W. 895, the supreme court of that state held such statute constitutional.

*Messrs. Freeman & Thelen*, for Respondent, submitted a brief; *Mr. Jas. W. Freeman* argued the cause orally.

In order to give any meaning to Chapter 8, so as to render it capable of construction and interpretation, there should have been a phrase substantially as follows: "After making due allowance in the actual cost of transportation from the point where the same is purchased to the market where it is sold or intended to be sold, *etc.*" The above is substantially the

phraseology to be found in Article V, Chapter 45 of the Revised Statutes of Nebraska, 1913. Upon examination of the statutes in every state which we have been able to find on this subject, including the states of South Dakota, Nebraska, Minnesota and Iowa, all of the laws in those states are to be found with a provision similar to the one set forth hereinabove, as being from the state of Nebraska, and each and every one use the phrase "after equalizing the distance from the point of purchase, etc.," instead of the phrase "point of production, manufacture or distribution," although all of the states that have statutes similar to the one found in Chapter 7 of our law use either the same or words importing the same meaning as those used in section 1 of Chapter 7.

Where the same word is used in different parts of the statute, the presumption obtains that it was used in the same sense throughout, and where its meaning in one instance is clear, such meaning will attach to it elsewhere. (*National Mines Co. v. Sixth Judicial District Court*, 34 Nev. 67, 116 Pac. 996; *Gillen v. Ocean Accident etc. Corp.*, 215 Mass. 96, L. R. A. 1916A, 371, 102 N. E. 346; *Ryan v. State*, 174 Ind. 468, Ann. Cas. 1912D, 1341, 92 N. E. 340.) With reference to the construction of penal statutes such as this is, we find the rule to be that penal statutes must be construed strictly according to the intention of the legislature as described by the import of the words, and when not remedial are not to be extended by equitable principles. (*Melody v. Reab*, 4 Mass. 471; *Hosmer v. Sargent*, 8 Allen (Mass.), 97, 85 Am. Dec. 683.) "A penal statute must be strictly construed and cannot be extended to cases not included within the clear import of its language." (*Greek-Am. Produce Co. v. Illinois Cent. Ry. Co.*, 4 Ala. App. 377, 58 South. 994; *Price v. Board of Commissioners*, 22 Colo. App. 315, 124 Pac. 353.) If ambiguous, it will be construed more strongly in favor of the defendant than it would if the statute were remedial. (*Bolles v. Outing Co.*, 175 U. S. 262, 44 L. Ed. 156, 20 Sup. Ct. Rep. 94.)

The following is a list of decisions interpreting statutes relating to unfair discrimination in buying and selling: *State v. Fairmont Creamery Co.*, 153 Iowa, 702, 42 L. R. A. (n. s.) 821, 133 N. W. 895; *State v. Drayton*, 82 Neb. 254, 130 Am. St. Rep. 671, 23 L. R. A. (n. s.) 1287, 117 N. W. 768; *State v. Bridgeman & R. Co.*, 117 Minn. 186, Ann. Cas. 1913D, 41, 134 N. W. 496; *State v. Central Lumber Co.*, 24 S. D. 136, 42 L. R. A. (n. s.) 804, 123 N. W. 507.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Rocky Mountain Elevator Company was charged by information with unfair discrimination under section 1, Chapter 8, Laws of 1913. Upon the issues raised by a plea of not guilty, the cause was brought to trial and the state introduced its evidence and rested. At the instance of the defendant the court directed the jury to return a verdict of not guilty, and from that order the state appealed.

The charging part of the information follows: "The above-named defendant being then and there a corporation doing business in the state of Montana, and engaged in the buying and selling of grain, a commodity in general use, did intentionally for the purpose of destroying the competition of the Farmers' Co-operative Elevator Company, a corporation, then and there a regularly established dealer in grain, discriminate between different sections, communities, and parts of this state, by buying wheat at a higher price or rate, at Chouteau, in the county of Teton, Montana, than said defendant paid for the same commodity in other sections of the state, viz., at Dutton, Montana, after equalizing the distance from the point of production, manufacture, or distribution, and freight rates therefrom."

The motion for a directed verdict specified three grounds:

- (1) The information does not state facts sufficient to constitute an offense.
- (2) The statute does not define a public offense.

(3) The evidence is insufficient to prove that a public offense has been committed.

We enter upon our investigation indulging the presumption [1] that the ruling of the trial court is correct, and therefore, if the order can be justified upon any ground of the motion, it will be upheld. (*Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055.) If the right result was reached, it is immaterial whether the right reason was assigned for it. (*City of Butte v. Goodwin*, 47 Mont. 155, Ann. Cas. 1914C, 1012, 134 Pac. 670.)

This court, acting in harmony with the general rule observed [3] by appellate courts, will not determine the validity of a statute unless such determination is necessary to a decision of the particular case, and this for the reason that every statute is presumed to be valid and courts are not created to decide moot questions.

The evidence introduced by the prosecution is altogether insufficient to show any violation of the statute. Chapter 8, Laws of 1913, seeks to define and provide punishment for unfair discrimination in *buying*. Unfair discrimination in *selling* is defined in Chapter 7, enacted at the same session. If a crime is defined in Chapter 8, the definition is to be found in section 1, which provides that any person, firm or corporation engaged in buying, selling, producing, manufacturing or distributing any commodity in general use, who intentionally, for the purpose of destroying or preventing competition, shall discriminate between different persons or communities, or parts of the state, by purchasing such commodity at a higher price in one part of the state than such person, firm or corporation pays for the same commodity in another section, "after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom," shall be guilty of unfair discrimination. It will be observed at once that it was not the intention of the legislature that it should be a crime to pay a higher price for a commodity in one part of the state than in another, even after making allowance for the difference in market price as



affected by different freight rates. It is only when the discriminatory rate is paid intentionally for the purpose of stifling existent competition or preventing a new competitor entering the same commercial field, that the act of paying the higher price is denounced as a crime. Before it can be said that a crime has been committed under this statute, there must be some evidence from which the wrongful intention can be inferred. The charge here made is that it was the purpose of the defendant to destroy the competition of the Farmers' Co-operative Elevator Company at Chouteau.

The evidence introduced by the prosecution discloses that in January, 1915, the defendant, a Minnesota corporation, was engaged in buying wheat in Teton county; that it owned the only elevator at Dutton; that it owned an elevator at Chouteau; that the Farmers' Co-operative Elevator Company, a domestic corporation, owned an elevator at Chouteau and was engaged in buying wheat at that point; that on January 19, I. N. Caskey, a farmer living between Dutton and Chouteau, sold a load of wheat to the defendant at Dutton and another load of the same wheat to defendant at Chouteau; that the wheat sold at Dutton was graded by defendant as No. 3, docked six pounds per bushel, and brought \$1.11 per bushel; that the wheat of identical character and quality sold at Chouteau was graded No. 1 by defendant, docked one pound per bushel, and brought \$1.26 per bushel; that Dutton is situated on a main line of railway, and Chouteau on a branch line; that Dutton enjoys an advantage in freight rates of one cent per hundredweight over Chouteau to coast and Minnesota market points, and an advantage of  $1\frac{1}{2}$  cents per hundredweight to Great Falls.

This is all of the evidence so far as substance is concerned. It fails to make out a case in this: (a) It fails to show, or even suggest, that the Farmers' Co-operative Elevator Company was a competitor of the defendant at Chouteau. So far as this record goes, the two concerns may have been acting in perfect accord—even by agreement. (b) It fails to show, or even intimate, that the price paid at Chouteau was more than the fair market price

for the grain. (c) It fails to disclose that the price paid by the defendant at Chouteau was more than the Farmers' Co-operative Elevator Company was paying or was willing or able to pay for the same grain at the same time and place. If, for instance, the Farmers' Co-operative Elevator Company was able to pay \$1.26 per bushel for the same quality of grain and could make a reasonable profit from the transaction, it would have no cause for complaint, however much the grain raisers in the neighborhood of Dutton might have. It is impossible to determine from this evidence whether the apparent discrimination was in favor of Chouteau or against Dutton; whether the price paid at Chouteau was more than the market warranted or whether the price paid at Dutton was unconscionably low.

This is a criminal action, and the defendant cannot be convicted upon mere suspicion. The elements of the crime must be shown by evidence which will convince a fair-minded jury of defendant's guilt beyond a reasonable doubt, and it cannot be contended that this evidence measures up to that standard.

Without determining the validity of Chapter 8 above, we may with propriety refer to that portion of section 1 quoted above, and, in passing, remark that it appears meaningless, and particularly so when applied to a case of the character of the one attempted to be stated in the information filed in this instance.

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## STATE, RESPONDENT, v. LEWIS, APPELLANT.

(No. 3,808.)

(Submitted June 22, 1916. Decided July 12, 1916.)

[159 Pac. 415.]

*Criminal Law — Homicide — Instructions — "Assault" — "Reasonable Doubt" — Verdict — Impeachment — Affidavits of Jurors — Trial — Practice — Exceptions — Briefs — Assignments of Error.**Appeal — Briefs — Assignments of Error — Insufficiency.*

1. General assignments that the evidence is insufficient to sustain the verdict in a criminal cause, and that the verdict is against law, without pointing out the particulars in which the former is insufficient and the latter is against law, do not entitle the appellant to a review thereof.

*Criminal Law — Exceptions — Review — Statutes.*

2. *Held*, that Chapter 135, Laws of 1915, dispensing with the necessity of formal exceptions, governs the procedure in civil—not criminal—causes.

*Same — Homicide — Instructions — "Assault" — Definition.*

3. Where the court in its instructions had used the words "assailant" and "assaulted," on a trial for murder in the first degree, refusal to submit an instruction defining the term "assault" was harmless, inasmuch as its meaning must be regarded as understood by the average juror without specific definition.

*Same.*

4. Where under the evidence the defendant was either guilty of unlawful homicide or not guilty at all, refusal to give an instruction defining the lesser offense of assault was proper.

*Same — Instructions — "Reasonable Doubt" — Definition.*

5. An instruction that a reasonable doubt is a doubt founded on reason and not one arising from mere caprice or groundless conjecture, though not in the words of the one approved in *Territory v. McAndrews*, 3 Mont. 158, was not open to objection.

[As to what is a reasonable doubt, and instructions to jury on the subject, see note in 48 Am. St. Rep. 566.]

*Same.*

6. After the trial court has fully stated to the jury in the instructions the presumptions of which the law gives the defendant charged with crime the benefit, it is sufficient if they are told that they must acquit him unless they are satisfied of his guilt beyond a reasonable doubt, without further definition of that term.

*Same — Instructions — What are not.*

7. Directions to the jury as to their conduct in the jury-room and as to the form in which they may return their verdict are not instructions on the law of the case, which must be in writing; hence they may be given orally.

Same—Verdict—Impeachment—Affidavits of Jurors.

8. Except in cases where it has been reached by means other than a fair expression of opinion by all the jurors, their verdict cannot be impeached by the affidavit of one or more of the individuals composing the jury.

*Appeal from District Court, Gallatin County; Ben B. Law, Judge.*

GEORGE W. LEWIS was convicted of manslaughter, and appeals from the judgment and an order denying him a new trial. Affirmed.

*Mr. Geo. D. Pease, for Appellant, submitted a brief and argued the cause orally.*

The court erred to the prejudice of the defendant in imposing a fine of \$50 against Mr. Pease, one of the defendant's counsel, for contempt, and in making the ruling as set forth in the record. The mere fact that counsel was fined for contempt, we agree, is not sufficient error to show prejudice, but if counsel for defendant, without any just cause or excuse, is fined by the court for contempt under such circumstances as show the court has done the same in a spirit of anger and through unfairness, then the courts hold that such fining of defendant's counsel for contempt is prejudicial error, especially where the same is done in the presence of the jury. "The utmost care should be used by the trial judge, where human life is involved, not to let any expression fall capable of being interpreted by the jury as an index of what he thinks of the prisoner, his counsel or his case." (*Mathis v. State*, 45 Fla. 46, 34 South. 287; 1 Brickwood's Sackett on Instructions, 3d ed., sec. 88; *State v. Allen*, 100 Iowa, 7, 60 N. W. 274; *Chicago City Ry. Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796; *Wheeler v. Wallace*, 53 Mich. 355, 364, 19 N. W. 33, 37; *Walker v. Coleman*, 55 Kan. 381, 49 Am. St. Rep. 254, 40 Pac. 640; 12 Cyc. 542.) "An expression of impatience at the waste of time made to one of the counsel in the conduct of the case is held to be error." (1 Brickwood's Sackett on Instructions, 3d ed., sec. 88; *State v. Philpot*, 97 Iowa, 365, 66 N. W. 730; *Valley Lumber Co. v. Smith*, 71 Wis. 304, 5 Am. St.

Rep. 216, 37 N. W. 412; *Anglo-Am. Packing etc. Co. v. Baier*, 31 Ill. App. 653; *State v. Pratt*, 121 Mo. 566, 26 S. W. 556.)

The law does not authorize the trial court to comment upon the evidence and to unjustly criticise counsel, as was done in this case. (*Kirk v. Territory*, 10 Okl. 46, 60 Pac. 797; *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852, 853; *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835, 843.)

The instruction given on the subject of reasonable doubt, omits to state that it is "such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied"; it omits to include within its definition "all of the evidence produced"; it omits the element of moral certainty, and places the burden upon the jury of giving a reason for a doubt. This court has approved the definition of "reasonable doubt" requested, being the definition set forth in *Territory v. McAndrews*, 3 Mont. 158, 165, in the following cases: *State v. Gibbs*, 10 Mont. 213, 10 L. R. A. 749, 25 Pac. 289; *State v. Vineyard*, 16 Mont. 138, 40 Pac. 173; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, 31 L. R. A. 294, 41 Pac. 998; *State v. Clancy*, 20 Mont. 498, 52 Pac. 267; *State v. Harrison*, 23 Mont. 79, 57 Pac. 647.

In the definition of "reasonable doubt" given by the court in the instruction objected to in this case, the burden is placed upon the jurors of finding a reason for the doubt. In other words, the court says a reasonable doubt is a doubt which has some reason for its basis. It has been time and again held that such an instruction is error. (*Smith v. State*, 142 Ala. 14, 39 South. 329; *Darden v. State*, 73 Ark. 315, 84 S. W. 507, 200 U. S. 615, 50 L. Ed. 621, 26 Sup. Ct. Rep. 758; *State v. Lee*, 113 Iowa, 348, 85 N. W. 619.)

*Mr. J. B. Poindexter*, Attorney General, *Mr. J. H. Alvord*, Assistant Attorney General, and *Mr. H. A. Bolinger*, County

Attorney of Gallatin County, submitted a brief in behalf of Respondent; *Mr. Alvord* and *Mr. I. W. Choate*, Assistant County Attorney of Gallatin County, argued the cause orally.

An offer was made to show that deceased had criticised Lewis, and that he was "more or less abusive." This offer, of course, is based upon the theory of self-defense, but a mere showing of dislike or criticism is not sufficient. The defendant in support of self-defense must show threats. Mere vituperative and abusive language about the defendant does not amount to a threat, and is not admissible as such. Such language must indicate an intention on the part of the deceased to take life or do serious bodily injury. (*Combs v. State*, 75 Ind. 215; *Chalk v. State*, 35 Tex. Cr. App. 116, 32 S. W. 534.) At least one court has gone so far as to hold that such evidence is not competent for any purpose when not communicated to the defendant prior to the homicide. (*Levy v. State*, 28 Tex. Cr. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596.)

The definition of reasonable doubt given in *Territory v. McAndrews*, has, it is true, been approved by many courts of last resort, including our own, but at no time has any court gone to the length of holding that the abstract idea embraced in the words "reasonable doubt" can be defined only by the words used in *Commonwealth v. Webster*, and adopted by our supreme court in *Territory v. McAndrews*. The supreme court of the United States has often expressed its disapproval of attempts to define the words "reasonable doubt." In *United States v. Hopkins*, 26 Fed. 443, Judge Dick said: "The inherent imperfection of the language renders it impossible to define in exact, express terms the nature of a reasonable doubt." In *Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481, the court said: "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." (See, also, *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708, 7 Sup. Ct. Rep. 614; *Commonwealth v. Tuttle*, 12 Cush. (66 Mass.) 502; *Commonwealth v. Cobb*, 14 Gray (80 Mass.), 57;

*Commonwealth v. Harman*, 4 Pa. St. 269, 274; *Regina v. White*, 4 Fost. & F. 383.)

Acquiescing in the view that the words "reasonable doubt" are not capable of definition, that they define themselves, that they are words of common use, and as easily understood by jurors as by judges, Wigmore on Evidence, section 2497, says: "The effort to perpetuate and develop these unserviceable definitions is a useless one, and serves to-day chiefly to aid the purposes of the tactician. It should be wholly abandoned."

It is not error to give oral direction to a jury as to their conduct while deliberating. These are not instructions. "A direction as to the form of a verdict is not an instruction which must be written." (*Douglas v. Territory*, 1 Okl. Cr. 583, 98 Pac. 1023; *People v. Bonney*, 19 Cal. 426; *State v. Potter*, 15 Kan. 302.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was tried upon an information charging him with the crime of murder in the first degree. He was found guilty of manslaughter, and sentenced to confinement in the state prison for a term of not less than seven years and six months nor more than ten years. He has appealed from the judgment and an order denying his motion for a new trial.

The homicide occurred during the afternoon of May 3, 1915, on a farm owned by L. S. Briggs, a few miles from Bozeman, in Gallatin county. The defendant and deceased, Joseph Ennis, had been in the employment of Briggs, who resided in Bozeman, and had charge of the cattle and horses belonging to him and kept on the farm. A feeling of jealousy had arisen between them as to the extent of the authority conferred upon them, respectively, by Briggs for the management and care of the stock. Blame for the supposed loss of a calf, while the defendant and a young son of the deceased were driving some cows with their calves to the farm from a neighboring farm where they had been kept, was charged by defendant to the son.

Understanding that he was charged with a theft of the calf, the son reported the charge to the deceased. The pre-existing jealousy thus ripened into enmity, which found expression in threats by deceased that he would have a settlement with the defendant. On the afternoon of the day above stated, Briggs had gone out from Bozeman to deliver some cattle which he had sold to one Bowles. When the work of separating the cattle had been accomplished, Briggs and other persons present went to inspect a young stallion kept on the place. Defendant and deceased were both present. The former, expecting trouble, had armed himself with a revolver. The latter was not armed. During the course of the inspection the deceased accosted the defendant with reference to the alleged charge against his son. After the exchange of a few words the two began to fight with their fists. In the few moments during which the struggle continued, defendant's revolver was discharged three times, the last shot inflicting upon the deceased a wound which resulted in his death about two hours later. The defense interposed by the defendant was that the revolver was accidentally discharged while he was using it as a club to protect himself from an assault upon him by deceased, he having drawn it for this purpose only.

Error is assigned upon rulings in the admission and exclusion of evidence, upon the giving and refusing to give certain instructions, upon insufficiency of the evidence to justify the verdict, and upon the ground that the verdict is contrary to law. Error is alleged also upon the conduct of the trial judge and county attorney by reason of which the defendant did not have a fair and impartial trial.

1. Counsel does not undertake in his brief to point out any [1] particular in which the evidence is insufficient. We shall therefore pass the assignment without comment, further than to say that we have examined the record with attention and find the evidence amply sufficient to justify the conclusion of the jury. Neither does counsel point out wherein the verdict is contrary to any of the instructions. In our opinion, the charge



embodies the law applicable to the facts disclosed by the evidence, and fully and fairly submits every issue in the case. Questions presented by the refusal of the court to submit requested instructions will be noticed later.

2. During the trial, counsel seems to have proceeded upon [2] the assumption that Chapter 135 of the Laws of 1915 (Laws 1915, p. 298) applies to criminal as well as civil cases, for no formal exceptions were reserved to the rulings upon the admissibility of evidence during the course of the trial. Neither were exceptions reserved to anything said or done by the trial judge or the county attorney. Whatever may have been counsel's view of the law upon the subject, the result is that none of the questions sought to be presented by the assignments in these particulars are before us for review. Section 1 of the Act in question, except as therein provided, dispenses with the necessity of formal exceptions in civil cases, but has no application to criminal cases. The purpose of the Act, as appears upon its face, was to enlarge the application of section 6784 of the Revised Codes, which relates to exceptions in civil cases only. This being so, the provisions of the Codes, relating to exceptions in criminal cases, were left in full force and are controlling. These are found in sections 9340, 9346 and 9347 of the Revised Codes. It requires only a cursory examination of these, together with section 9271, to understand that in criminal cases specific objection and exception, reserved upon the particular ruling, are necessary to require or permit this court to review it.

3. Contention is made that the court erred in refusing to [3] submit to the jury a definition of the term "assault." The purpose for which the instruction was offered is not made clear by what transpired at the time the instructions were settled. The argument is that, inasmuch as the terms "assaulted," "assailant," *etc.*, are found in the other instructions, a definition of the term "assault" was necessary to enable the jury to understand the others. While the court might properly have submitted the instruction, we do not think the defendant

should be granted a new trial because it refused to do so. The terms in question, like the expression "preponderance of the evidence," are of such common use that their meaning may be regarded as understood by the average juror without specific definition. Some latitude must be accorded to the trial court in such matters, in view of the facts in evidence and the character and apparent intelligence of the jury in the particular case. (*Rand v. Butte El. R. Co.*, 40 Mont. 398, 107 Pac. 87.)

[4] Moreover, in view of the defense interposed, the jury, we think, would not have been justified in finding the defendant guilty of the lesser offense of assault. He was guilty of unlawful homicide or should have been acquitted entirely. (*State v. McGowan*, 36 Mont. 422, 93 Pac. 552; *State v. McDonald*, 51 Mont. 1, 149 Pac. 279.) On neither theory, therefore, do we think the court was in error in refusing the instruction.

4. On the subject of reasonable doubt the court instructed the [5] jury as follows: "The term 'reasonable doubt' best defines itself. In a legal sense, however, a reasonable doubt is a doubt which has some reason for its basis; a doubt for which there exists in the minds of the jurors a reason, and not a doubt arising from mere caprice or groundless conjecture." It is argued that this instruction was prejudicial, in that it put upon the defendant the burden of furnishing to every juror a reason why he should have a reasonable doubt of defendant's guilt; that it required each juror to have a reason which he could express in words, and was calculated to confuse rather than enlighten the jury. It is true, as counsel says, that this court has frequently approved as correct and sufficient to meet all requirements the instruction taken from *Commonwealth v. Webster*, 5 Cush. (59 Mass.) 295, 52 Am. Dec. 711, which counsel requested the court to give in this case. (*Territory v. McAndrews*, 3 Mont. 158; *State v. Martin*, 29 Mont. 273, 74 Pac. 725; *State v. De Lea*, 36 Mont. 531, 93 Pac. 814.) It does not follow, however, that it must for this reason condemn the instruction submitted. It is not open to the objections

urged against it. It did not cast any burden upon the defendant; nor did it require any juror to be able to state a reason for his conclusion; nor can it be said that it was misleading or confusing unless the use of the expression "reasonable doubt" itself imports confusion and uncertainty. On the contrary, like the expression "to a moral certainty," its legal equivalent, it is in common use and well understood by any person of average intelligence. It is for this reason that many courts and text-writers characterize as futile efforts to define or explain it. (*Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481; *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708, 7 Sup. Ct. Rep. 614; *State v. Davis*, 48 Kan. 1, 28 Pac. 1092; *State v. Killion*, 95 Kan. 371, 148 Pac. 643; Wigmore on Evidence, 2497; Chamberlayne on Modern Law of Evidence, 996 B.) It [6] may well be deemed sufficient, after the court has fully stated to the jury the presumptions of which the law gives the defendant the benefit, as was the case here, if they are told without further explanation that they must acquit him unless they are satisfied of his guilt beyond a reasonable doubt. We have frequently said it is safer for trial courts to use instructions which have been approved by this court (*State v. Gibbs*, 10 Mont. 213, 10 L. R. A. 749, 25 Pac. 289), instead of formulating new ones. Even so, we do not think error was committed in submitting the instruction in question. Other instructions refused were fully covered by the charge as given.

5. Contention is made that the court erred in giving oral instructions to the jury. The record furnishes no ground for this contention. At the close of the argument the court orally [7] directed the jury as to their conduct in the jury-room and as to the form in which they might return their verdict, and informed them that their verdict must be unanimous. There was no error. Directions as to such matters are not instructions on the law of the case which must be written. (*People v. Bonney*, 19 Cal. 426; *State v. Potter*, 15 Kan. 302.) If it be conceded that there was error, no objection was made at the time nor any exception reserved as required by the statute. (Rev. Codes, sec. 9271.)

6. It is said that the defendant did not have a fair trial by [8] reason of the bias and prejudice of juror Webster. We find in the record an affidavit by Frank P. Van Ausdol, who served as a juror in the case, from which it appears that while the jury were discussing the reputation of Ennis, the deceased, Webster made the statement that the defendant was reputed to be a gambler, and that he had robbed his (Webster's) boy twice, and that, upon being charged with entertaining prejudice against the defendant, he admitted that he did so. There is also an affidavit by Webster in which he denies that he made any such statement. These affidavits cannot be considered for any purpose. The general rule is that a verdict cannot be impeached by the affidavit of jurors who rendered it. The one exception is that where it has been decided by means other than a fair expression of opinion by all the jurors. (Rev. Codes, sec. 9350; *State v. Beesskove*, 34 Mont. 41, 85 Pac. 376; *State v. Wakely*, 34 Mont. 427, 117 Pac. 95.) In *State v. Beesskove* it was said: "This section provides for the one exception, namely, cases where the verdict has been decided by lot, or by any means other than a fair expression on the part of all the jurors. In such case the impeaching affidavit may be made by members of the jury. (Code Civ. Proc., sec. 1171; Rev. Codes, sec. 6794.) This express exception, under the rule, '*expressio unius est exclusio alterius*,' it would seem excludes all other exceptions."

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. HAUSWALD, RESPONDENT, v. ELLIS ET AL.,  
COMMRS., APPELLANTS.

(No. 3,837.)

(Submitted June 24, 1916. Decided July 12, 1916.)

[159 Pac. 414.]

*Mandamus—Counties—Assessable Property—Increase in—  
Office and Officers—Appeal and Error—Documentary Evi-  
dence.***Mandamus—Counties—Assessable Property—Increase in—Evidence—Office  
and Officers.**

1. By reason of an increase in the assessed valuation of property in a county it was raised from the sixth to the fifth class, whereby the office of county auditor came into existence. After relator had been elected to such office, the board of county commissioners refused to order salary warrants to issue to him, for the reason that because of alleged double assessments, clerical errors, etc., the assessed property value was below the amount required to justify the advancement of the county to the higher class. Evidence held to sustain the finding of the trial court that the county had sufficient assessable property to bring it into the fifth class, and that the issuance of a writ of mandate to the board was proper.

**Appeal and Error—Documentary Evidence—Value—Review.**

2. Where a proceeding in *mandamus* was submitted to the district court wholly upon documentary evidence, the supreme court may on appeal as readily determine its value as could the trial court.

[As to the duties the performance of which may be compelled by *mandamus*, see note in 125 Am. St. Rep. 492.]

*Appeal from District Court, Carbon County; A. C. Spencer,  
Judge.*

MANDAMUS proceedings by the State of Montana, on relation of F. A. Hauswald, against A. A. Ellis and others, as the Board of County Commissioners of Carbon County. Judgment for plaintiff and defendants appealed. Affirmed.

*Messrs. Nichols & Wilson*, for Appellants, submitted a brief; *Mr. Harry Wilson* argued the cause orally.

*Messrs. Walsh, Nolan & Scallon*, for Respondent, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

The authority of the county commissioners is given by section 2894. The board is one of limited powers. It can only

exercise such powers as are conferred by law or are necessarily implied. (*State ex rel. Gillett v. Cronin*, 41 Mont. 293, 109 Pac. 144; *State v. Collins*, 21 Mont. 448, 53 Pac. 1114; *Yegen v. Board of County Commissioners*, 34 Mont. 79, 85 Pac. 740; *State ex rel. Holley v. Boerlin*, 30 Nev. 473, 98 Pac. 402.) The board having fixed the classification of the county at the September meeting, it was beyond its power to consider the matter at the December meeting, and it was equally beyond its power to make corrections as to assessments in the intervening time.

In reference to the assessment of property, the assessor can only proceed at the time and in the manner pointed out by statute, and to justify his assessment, he must be able to put his finger on the statute that gives him authority to make it. (Welty on Assessments, p. 36; *City of Hannibal ex rel. Bassen v. Bowman*, 98 Mo. App. 103, 71 S. W. 1122.) The assessment-roll is the only evidence as to what the assessment of property is. (*State v. Cook*, 14 Mont. 201, 36 Pac. 44; *Allen v. McKay & Co.*, 139 Cal. 94, 72 Pac. 713; 10 Ency. of Evidence, p. 728.) Revision and correction of assessment-roll may not be done after completion of same. (27 Am. & Eng. Ency. of Law, p. 697; *Johnson v. Malloy*, 74 Cal. 430, 16 Pac. 228.) In the case of boards of equalization, statutes providing for times and places of meeting are mandatory. (27 Am. & Eng. Ency. of Law, p. 713.) The board has no right to reconsider action which is judicial or quasi judicial. (*Gulnac v. Board of Chosen Freeholders*, 74 N. J. L. 543, 122 Am. St. Rep. 405, 64 Atl. 998; *Furness v. Brummitt*, 48 Ind. App. 442, 95 N. E. 1114; *Craig v. Griffin*, 107 Ark. 298, 154 S. W. 945; *Board of Law Library Trustees v. Board of Supervisors*, 99 Cal. 571, 34 Pac. 244; *People v. Reid*, 11 Colo. 138, 17 Pac. 302.) We submit that it was beyond the power of the board to rescind its action fixing the classification of Carbon county at the December meeting, and its attempt to do so is a nullity.

MR. JUSTICE SANNER delivered the opinion of the court.

In September, 1914, there was laid before the board of [1] county commissioners of Carbon county the assessment-roll for that year footed to show property within the county of an assessed valuation of \$8,015,072; whereupon, pursuant to the provisions of section 2975 of the Revised Codes, the board made and caused to be spread upon its minutes a formal order declaring Carbon county to be a county of the fifth class. In virtue of this classification, if properly made, there came into existence the office of county auditor for said county, and one F. A. Hauswald was at the general election held in November, 1914, duly elected to such office. A certificate of election was issued to him, he qualified as required by law, and at all times after the first Monday of January, 1915, sought to perform, and held himself in readiness to perform, the duties of that office. Meanwhile, and at its regular meeting in December, 1914, the board appointed one G. L. Finley to check the assessment-roll for 1914 and report to the board "what the aggregate assessment of said county was," and he, on December 23, 1914, presented his report to the effect that after making certain corrections for supposed errors, supposed double assessments, and certain deductions made by the board itself after December 1, 1914, there remained \$7,862,870 "total valuation from which taxes are collectible." On December 30, 1914, this report was "approved and ordered filed," whereupon the board made and caused to be spread upon its minutes a resolution declaring rescinded the order of September advancing the county of Carbon to the fifth class, because made "under a misapprehension of the facts" due to "errors and double assessments, clerical errors, and other mistakes." In consequence of this action the board declined to recognize Hauswald as county auditor and refused to pay his salary, and he brought this proceeding in *mandamus* to compel the board to order and sign warrants to him therefor.

The cause was submitted for decision upon an agreed statement of facts, which involved the concession that the resolution of December 30 is nugatory, and the classification made in September must stand, if the assessment-roll as then exhibited, but properly corrected and footed, disclosed an assessed valuation greater than \$8,000,000. As evidence pertinent to such corrections, the statement of facts presented two documents: Exhibit "A," containing such entries on the assessment-roll as the commissioners claim were duplications counted in the total; and Exhibit "B," containing such entries on the assessment-roll as were omitted by the assessor in footing the same because he deemed them duplications. Upon this data the trial court found that duplications to the amount of \$23,100 were shown by Exhibit "A" which ought to be deducted from the total; that unjustified omissions to the amount of \$8,225 were shown by Exhibit "B" which ought to be added to the total; and that the true assessed valuation, as shown by the assessment-roll in September, 1914, when the order of classification was made, was \$8,000,197. Upon these findings judgment was entered declaring Carbon county to be a fifth class county, and commanding that Hauswald be paid as county auditor. From this the commissioners appealed, presenting the naked question whether the findings and judgment are warranted by the evidence.

The cause was determined by the district court wholly upon [2] the evidence furnished by Exhibits "A" and "B"; and as this evidence is purely documentary, this court may determine its value without advantage or disadvantage over the learned trial judge. With regard to the effect of Exhibit "A" the contention is twofold: By the respondent, that the court was without authority to make any deductions on account of double assessments supposedly shown thereby; by the appellants, that further deductions amounting to \$5,030.70 should have been made. We shall assume, without deciding, that the court had the power to make any deductions for double assessments clearly commanded by the evidence; but, so assuming,



we question whether any of the deductions made were thus commanded. As we view the exhibit, not more than \$8,590 of the items shown by it and excluded by the court even seem to be cases of this character; while the evidence as to the remainder is colorless and equivocal or suggests a different conclusion. So, too, a most liberal view of the items which the appellants claim should have been excluded could not justify the exclusion of more than \$3,435.70, and this with very doubtful propriety. Subtracting these amounts from the total of \$8,015,072, as apparent from the roll in September, 1914, we still have a valuation of \$8,003,047.30, which result renders any inquiry into the propriety of the court's additions pursuant to Exhibit "B" wholly unnecessary.

In our opinion, the final judgment as rendered by the district court was correct, and is therefore affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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INTERSTATE POWER CO., RESPONDENT, v. ANACONDA  
COPPER MIN. CO. ET AL., APPELLANTS.

(No. 3,755.)

(Submitted June 26, 1916. Decided July 17, 1916.)

[159 Pac. 408.]

*Eminent Domain—Complaint—Description of Land—Sufficiency—Practice—Trial—Right to Open and Close—Evidence—New Trial—Harmless Error.*

**Eminent Domain—Trial Practice—Right to Open and Close.**

1. *Quære*: Has the owner of land sought to be condemned the right to open and close on the question of damages?

**New Trial—Harmless Error.**

2. For alleged error in a ruling which worked to the advantage of appellant, rather than to his prejudice, a new trial will not be ordered.

**Eminent Domain—Complaint—Description of Land—Sufficiency.**

3. Complaint in a condemnation suit which described the land by metes and bounds on three sides, and on the fourth merely designated

a navigable river as the boundary, without stating that by the latter description the high or low water mark was meant, *held* sufficient to meet the requirement of section 4529, Revised Codes.

Same—Complaint—Area of Land.

4. Under section 7337, Revised Codes, the area of the land sought to be acquired by condemnation proceedings is not required to be stated in the petition.

Same—Complaint—Unnecessary Allegations.

5. Where plaintiff electric power company in a condemnation proceeding alleged sufficient facts to show that the use sought to be made of the land was a public one, it was not necessary to specifically allege that there was a present or prospective demand for its products.

Same—Evidence—Immateriality.

6. Evidence as to the practicability of plaintiff's power plant and the method of its installation, *held* properly excluded as having no bearing on the question at issue—the amount of damages recoverable by defendants.

Same—Verdict—When Conclusive.

7. A verdict in a condemnation suit which was based upon a substantial conflict in the evidence and was well within the extremes fixed by the different witnesses, and which was approved by the trial court in denying appellants' motion for a new trial, will be accepted as conclusive on appeal.

[As to evidence of damages in eminent domain proceedings, see note in 22 Am. St. Rep. 49.]

*Appeal from District Court, Sanders County; Asa L. Duncan, Judge.*

CONSOLIDATED ACTIONS by the Interstate Power Company against the Anaconda Copper Mining Company and another. From judgments for plaintiff and orders denying them new trials, the defendants appeal. Affirmed.

*Mr. Henry C. Stiff*, for Appellants, submitted a brief and argued the cause orally.

*Messrs. Tolan & Gaines*, for Respondent, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The following statement, which is in part quoted from appellants' brief, will be sufficient to illustrate the contentions made herein in their behalf: "The respondent, plaintiff below, filed in the district court seven actions, numbered 601, 602.

603, 604, 605, 606 and 608, for the purpose of condemning certain parcels of land along the banks of Clark's Fork of the Columbia River, in Sanders county, Montana, the said lands to be flooded because of the proposed construction of a dam or dams across the channel of said stream, 'wherewith to confine and impound the waters of said river, the waters so confined and impounded to be then and thereafter used for the generation of electrical power.' Plaintiff sought to acquire a fee-simple title to the lands asked to be condemned, 'but reserving to defendants and their heirs, personal representatives, successors and assigns the right of access to the waters of the aforesaid river at any and all times.' The Anaconda Copper Mining Company, one of the appellants, was made a defendant in all of said actions, and the sole defendant in cause No. 608, and the Blackfoot Land Development Company, the other appellant, was made a defendant in one cause only, No. 605. There were other parties made defendants in six of the cases, but awards were made and the causes tried in the district court as to the Anaconda Copper Mining Company and Blackfoot Land Development Company only, and they are the sole appellants in this court. Appellants filed answers in all the cases in which they were made parties, on July 15, 1914, and on that date an 'order of condemnation' was made and filed in each case, and commissioners appointed." After the commission had made its award, the appellants, being dissatisfied with the amount of damages assessed, appealed therefrom to the district court. The several causes were by stipulation consolidated for the purposes of the trial and further proceedings except for final order and decree. The trial was had by the court sitting with a jury on November 17, 1914. Under the instructions of the court, the jury returned a separate verdict in each case, fixing the amount which they found appellants entitled to have awarded to them, and a separate judgment was rendered for this amount. While the appellant Blackfoot Development Company was made defendant in cause 605 only, it was disclosed during the trial that it had acquired

an interest in some of the lands which under the allegations in the pleadings appeared to be owned by the Anaconda Copper Mining Company only. It was thereupon agreed by counsel that in awarding the amounts to which each of these appellants should be found entitled, the jury should make their award as if the ownership of each parcel taken were correctly set forth in the pleadings. Upon the return of the several verdicts, final orders of condemnation and decrees were made and entered in accordance with the stipulation of counsel. Appellants' several motions for new trial having been denied, they brought the causes to this court by separate appeals from the several judgments and orders denying their motions. All of them have been submitted together upon one brief.

1. At the commencement of the trial, after argument by [1] counsel, the court directed that the plaintiff assume the burden of proof as in ordinary cases, and that the trial proceed accordingly. This ruling is made the basis of appellants' first assignment of error. There is a diversity of opinion among the courts as to which party has the right to open and close the trial on the question of damages in this class of cases. Mr. Lewis declares it to be the rule, supported by the great weight of authority, that the owner is entitled to open and close. The cases on the subject are cited in the note to his text. (Lewis on Eminent Domain, 3d ed., 645.) We are inclined to disagree with Mr. Lewis in his conclusion. But we are not required to examine the cases and announce a rule in this case, for the reason that counsel made no objection to the court's action, stating the grounds thereof, as required by the statute (Rev. Codes, sec. 6785), in force at the time the trial was had. But aside from this, if it be conceded that the appellants had the right to open and close, it does not appear, nor does counsel undertake to point out, wherein the appellants suffered prejudice. Counsel is content to rest upon the bare statement that the court denied him the right in question. [2] The course pursued by the court would seem to have been to their advantage rather than the contrary, for it cast

upon the respondent the burden of establishing the amount which it must pay appellants, by a preponderance of the evidence. Under these circumstances, appellants' claim that they are entitled to a new trial ought not to be treated with indulgence. (Rev. Codes, sec. 6593; *Copenhaver v. Northern Pac. R. Co.*, 42 Mont. 453, 113 Pac. 467; *White v. Chicago, M. & St. P. Ry. Co.*, 49 Mont. 419, 143 Pac. 561.)

2. By his second assignment, counsel questions the sufficiency of the several complaints, on the grounds (a) that they do not [3] contain a sufficient description of the several parcels of land sought to be condemned; and (b) that the facts stated do not show that the lands are sought for a public use. Section 7337 of the Revised Codes declares that "the complaint must contain \* \* \* a description of each piece of land sought to be taken." The description of each piece sought to be taken is set forth in the complaint by metes and bounds on three sides definitely fixed as to length and location by reference to the lot, section, and township of which it is a part, as designated by the public land surveys. For the other boundary, the river merely is designated. The objection made is that the description does not state that this means the line of low or high water, and hence the designated boundaries do not inclose the area sought. This contention is wholly without merit. It is a matter of common knowledge that Clark's Fork of the Columbia River is a navigable stream, and that grants of public lands lying along its course are bounded on that side by the line of the stream at low water. Mention of the stream as the extent of a boundary which terminates in that direction is sufficient to show a connection between such boundary and the line of low water. This is in accord with the rule declared by our statute. (Rev. Codes, sec. 4529.) In any event, it meets the requirement of the rule that "that is certain which can be made certain by means of the description or references contained in the petition." (Lewis on Eminent Domain, 3d ed., 549.)

Counsel suggests also that the description is insufficient because it does not state the area of each piece taken. The statute does not require the area to be stated. (Sec. 7337.) Its requirement is met when the description is definite enough to identify the land sought to be taken, even though it be conceded that the statement of the area would materially aid in its identification.

The second ground of criticism stated above proceeds upon the idea that under the requirement of the statute that the complaint contain a "statement of the right of the plaintiff," it was incumbent upon the respondent to allege that there is either a present or prospective demand for the electric current which it proposes to produce. It is alleged that the purpose for which the respondent was organized was, among other things, for the construction of an electric power plant by the use of water in the river; that the lands sought to be condemned are necessary for that purpose; that the current so to be generated will be used to supply power for pumping and distributing to and upon lands arid and semi-arid in character, water already appropriated and to be appropriated from the river for the benefit of all persons who shall desire to purchase and use the same; that it is also to be used for the purpose of aiding in the operation of industrial and commercial enterprises in the county and state, and to furnish heat, light and power to the public generally, etc. This, we think, is sufficient under the decision in *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 10 Ann. Cas. 1055, 8 L. R. A. (n. s.) 567, 88 Pac. 773, to [5] show that the proposed use is a public use, as well as that there is a present or prospective demand for the product of the enterprise.

Counsel cites no authorities to sustain his position. In our opinion, it would discourage, if not altogether prevent, the investment of capital in such enterprises, to declare a rule which would require the plaintiff in every case to allege and prove that its product can be profitably disposed of in the markets of the country. Men invest capital upon the hope and expecta-

tion of profit by disposing of their product, in whatever form, in the markets where others, who are engaged in like enterprises, dispose of their product. It is not infrequently the case that an enterprise creates its own market by furnishing a product to supply comforts, conveniences and facilities which were theretofore unknown, or, if known, were of inferior quality or were obtained at greater cost. Whether the founder of a proposed enterprise purposes to enter the market in order to compete for the favor of the public with the owners of other enterprises of the same character, or to furnish a new product which will create a market for itself by supplying a public want not theretofore supplied, is an inquiry which is not determinative of the question whether the enterprise is a public use. The statute declares what are public uses for which lands may be condemned. Among these are power plants to provide electric current for sale or for productive use, or to pump water for the purpose of irrigation, or for sale for other useful purposes. (Rev. Codes, sec. 7331; *Helena Power Transmission Co. v. Spratt*, *supra*.) It is sufficient to make out a case if the allegations of the complaint disclose that the plaintiff is one of the agencies through which the state has chosen to exercise the power of eminent domain, and that the use to which the property sought to be taken is one of the public uses enumerated in the statute. This is what is meant by the requirement that the complaint must contain a statement of the right of plaintiff. It would be absurd to lay down a rule which would require a railroad company to show that it has a present or prospective market for its potential carrying capacity, as a condition precedent to the exercise of its right to acquire a right of way. So, also, it would be impossible for a mining company seeking to acquire a right of way for a road to its mine or smelter, or land for a dumping ground for its tailings or refuse matter, to show that it could find a demand in the markets of the world for its mineral product.

3. Several of appellants' assignments question the propriety [6] of the court's rulings in admitting and excluding evi-

dence. We find no error in any of them. Much of the evidence related to the practicability of the plan adopted by the plaintiff for the installation of its plant, and kindred questions which could not in any way aid the jury in ascertaining the amount of damages to which the appellants were entitled—the only inquiry which was before the court for determination. The complaint in this behalf amounts to nothing more than that the court did not permit the appellants to introduce other evidence of the same character, and thus further confuse the issue to be submitted to the jury.

4. There is no basis for the contention that the evidence is insufficient to justify the several verdicts. Upon the assumption [7] that all the evidence introduced by the appellants upon the question of damages was competent, the most that can be said of it as a whole is that it presents a substantial conflict, and that the finding of the jury in each case is well within the extremes fixed by the different witnesses. This being so, and the court having approved the findings of the jury by denying appellants' motion for a new trial, we must accept the result as conclusive. (*Helena & Livingston Smelting & Reduction Co. v. Lynch*, 25 Mont. 497, 65 Pac. 919; *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 9 Ann. Cas. 470, 87 Pac. 963.)

The several judgments and orders are affirmed

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.



**BATCH, APPELLANT, v. HELENA LIGHT & RAILWAY CO.  
ET AL., RESPONDENTS.**

(No. 3,659.)

(Submitted May 11, 1916. Decided July 17, 1916.)

[159 Pac. 411.]

***Personal Injuries—Carrier and Passenger—Street Railways—  
Inspection of Appliances—Duty of Carrier—Appeal and  
Error—Theory of Case.***

**Personal Injuries—Theory of Case—Appeal.**

1. Where a personal injury case against a carrier was tried as though the latter's duty to provide safe conveyances was governed by the common law and without regard to section 5301, Revised Codes, it will be determined on appeal under the same theory.

**Same—Street Railways—Liability of Carrier—Erroneous Instructions.**

2. Instructions in an action by a passenger against a street railway company tried under the common law, that the carrier's responsibility for personal injuries due to defective appliances was confined to cases where such defects were visible or of long standing, and that responsibility could be avoided by a showing that some sort of an inspection had been made by a person competent to make a proper one, were erroneous, the carrier under the common-law rule being liable for defects which a most rigid examination might disclose, and for the slightest negligence in this respect.

**Same—Liability of Carrier—Correct Statement of Law.**

3. Where the jury were correctly instructed that proof of the accident to plaintiff caused by the breaking of a strap while the conductor was in the act of registering a fare by means of it, cast upon defendant company the burden of its exoneration; that it owed to plaintiff the highest degree of care; that such degree of care was required in the inspection of its equipment, including the strap, and keeping it in repair, and to anticipate all such results as might reasonably be expected in view of the conditions under which the equipment might be used, error in other instructions touching the liability of defendant was rendered harmless.

**Same—Inspection of Appliances—Insufficiency.**

4. Inspection of a strap used by the conductor in a street-car for registering fares, made by looking at it without subjecting it to an actual test, was insufficient to relieve the railway company from liability for injuries caused to plaintiff by the breaking of the strap while being used by the conductor, and his consequent fall upon plaintiff.

MR. JUSTICE HOLLOWAY dissenting.

[Liability of carrier to passenger for injury caused by fall of window of car, see note in ANN. CAS. 1912B, 850.]

***Appeal from District Court, Lewis and Clark County; J. M.  
Clements, Judge.***

**ACTION** by Mary Batch against the Helena Light & Railway Company and another. From a judgment for defendant, and an order denying a motion for new trial, plaintiff appeals. Reversed and remanded.

*Messrs. E. A. & F. E. Carleton*, for Appellant, submitted a brief; *Mr. E. A. Carleton* argued the cause orally.

Plaintiff having proven by competent testimony the happening of the accident, the burden was then upon the defendants to prove that they had done everything which the law required them to do to avoid the accident. This they failed to do. (*Emerson v. Butte Electric Ry. Co.*, 46 Mont. 454, 458, 129 Pac. 319; *Bond v. United Railroads of San Francisco*, 24 Cal. App. 157, 140 Pac. 982, 985.) "A railroad company is bound to know the effect of time and weather upon its appliances, and it should, by proper inspection, and timely changes and renewals, keep them safe." (1 Nellis on Street Railways, sec. 290; *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. 125, 67 N. Y. Supp. 985; *Smith v. Metropolitan Street Ry. Co.*, 59 App. Div. 60, 69 N. Y. Supp. 176; *O'Flaherty v. Nassau Electric Ry. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; *Weir v. Union Ry. Co.*, 112 App. Div. 109, 98 N. Y. Supp. 268; *Hegeman v. Western R. R. Corp.*, 13 N. Y. 925, 64 Am. Dec. 517.) Under the foregoing authorities, the evidence is insufficient to sustain the verdict and judgment rendered thereon, for the reason that there is no evidence whatever that the appliance in question was ever inspected, other than by a mere visual examination. Such an inspection is, as a matter of law, insufficient. (*Leveret v. Shreveport Belt Ry. Co.*, 110 La. 399, 34 South. 579; *Williams v. Louisiana Electric Light etc. Co.*, 43 La. Ann. 295, 300, 8 South. 938; *Alden v. New York Central R. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401; *Siemens v. Oakland S. L. & H. Electric Ry.*, 134 Cal. 494, 66 Pac. 672; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. (U. S.) 486, 14 L. Ed. 502; *New Jersey R. R. Co. v. Kennard*, 21 Pa. St. 203; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Laing v. Colder*, 8 Pa. St. 479, 482,

49 Am. Dec. 533; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 20 L. R. A. 316, 55 N. W. 270; *Dougherty v. Missouri R. R. Co.*, 97 Mo. 647, 661, 8 S. W. 900, 11 S. W. 251; *Palmer v. President etc. of D. & H. Canal Co.*, 120 N. Y. 170, 17 Am. St. Rep. 629, 24 N. E. 302.)

*Mr. Odell W. McConnell*, for Respondents, submitted a brief, and argued the cause orally.

The principles of law enunciated in instructions 9, 12 and 13 can be found almost *verbatim* in the text-books and adjudicated cases as approved instructions. (36 Cyc. 1501; *Müller v. United Ry. & Electric Co.*, 108 Md. 84, 17 L. R. A. (n. s.) 978, 69 Atl. 636; *Casper v. Drydock etc. R. Co.*, 23 App. Div. 451, 48 N. Y. Supp. 352; *Griffin v. Interurban Street R. R. Co.*, 46 Misc. Rep. 328, 94 N. Y. Supp. 854; *Kelly v. Metropolitan Street Ry. Co.*, 25 Misc. Rep. 194, 54 N. Y. Supp. 173; *Houston City Street Ry. Co. v. Autrey*, 4 Tex. Civ. 635, 23 S. W. 817; 2 Brickwood's Sackett on Instructions to Juries, sec. 2030; *Brod v. St. Louis Transit Co.*, 115 Mo. App. 202, 91 S. W. 993.)

Instruction 13 held the defendants to the highest degree of care, and told the jury that before they could find a verdict in favor of the defendants they must find that the injury was caused without any negligence on the part of the defendants. This was the gravamen of the case, for unless the plaintiff proved negligence on the part of the defendants, she could not expect to recover. That this instruction correctly states the law, see the following cases: *Southern Car & Foundry Co. v. Jennings*, 137 Ala. 247, 34 South. 1002; *Louisville & N. Ry. Co. v. Campbell*, 97 Ala. 147, 12 South. 574; *Louisville & N. Ry. Co. v. Allen's Admr.*, 78 Ala. 494; 2 Brickwood's Sackett on Instructions, secs. 1409, 1508.

Counsel cites the case of *Weir v. Union Ry. Co.*, 112 App. Div. 109, 98 N. Y. Supp. 268, as being on all-fours with this case. In that case the doctrine of *res ipsa loquitur* was held applicable, because the passenger was injured by the falling of a device used in registering fares. In the case at bar the device for register-

ing fares did not fall, nor was there any defect therein, nor was any shown. In the *Weir Case* the apparatus fell without apparent cause. Not so in the case at bar. The reason that the strap pulled out was because the conductor tugged and pulled at it three or four times. There is no evidence that the register strap was in such a condition before the accident that it was likely to pull out, and in the absence of evidence that such a condition existed before the accident, the company is not chargeable with negligence, and the maxim *res ipsa loquitur* does not apply. (*Millie v. Manhattan Ry. Co.*, 10 Misc. Rep. 734, 31 N. Y. Supp. 801.)

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiff by this action sought damages for personal injuries which she claims to have sustained while traveling as a passenger for hire on one of the street-cars of the defendant Helena Light & Railway Company bound for Kenwood, a suburb of this city. The undisputed facts are: That at the end of the car and just under the roof there was a device for registering fares, worked by means of a bar extending the length of the car, to which, at intervals, straps were attached in pairs, one of such straps being on one side of the bar for tickets, and one on the other side for cash fares. These straps were connected to the bar by means of short, projecting metal levers, through a slit, each strap being riveted so as to form a loop. That while the car approached the curve at Lawrence Street and Harrison Avenue, the defendant King as conductor was registering fares, and as it entered said curve he pulled one of the ticket straps, which gave way, causing him to fall against and upon the plaintiff. Just how the strap gave way, with what violence the conductor fell, and whether as the result the plaintiff sustained any serious injury, are subjects of conflicting evidence. The verdict was for the defendants, and plaintiff has appealed from the judgment entered in consequence, as well as from an order denying her a new trial. The errors assigned comprehend four

rulings upon evidence, three given instructions, and the refusal of a new trial.

1. While the complaint contains several charges of negligence, reliance was placed upon negligence in permitting the registry strap to be and become deficient. As three of the assigned rulings upon evidence relate to the condition of the car in other respects, and as the fourth was waived upon oral argument before us, we find nothing prejudicial in any of these rulings.

2. The position of the defendants was and is that they cannot [1, 2] be held to answer for the plaintiff's injuries, if she sustained any, because the company had performed its full duty of care toward her by causing the car in question to be inspected within a few hours prior to the accident, which inspection failed to reveal any defect in the equipment. To enforce this view upon the jury, it offered, and the court gave, three instructions numbered 9, 12 and 13, of which the plaintiff here complains. It is perfectly clear that under any possible interpretation of section 5301 of our Codes, these instructions, as well as the view they were offered to express, were erroneous; but as this section was not invoked by either party at the trial and the cause was presented as though governed by the common law, it must be judged here in accordance with that theory. So judged, we think instructions 9 and 12 are still open to criticism, and, if they stood alone, might command a reversal. The responsibility of a street railway company to its passengers for injuries due to defective appliances is not even at the common law confined to cases where such defects are visible or of long standing; nor can it be avoided on the mere showing that some sort of an inspection was made by a person competent to make a proper one. Such responsibility is covered by the rule—as old as the stage-coach and applicable alike to all carriers of passengers—found in the text of Story on Bailments, sections 592, 601a: "If there is any defect in the original construction of a stage-coach, as, for example, in the axletree, although the defect be out of sight and not discoverable upon a mere ordinary examination, yet if

the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor. The same rule will apply to any other latent defect, which might be discovered by a more minute examination and more exact diligence. \* \* \* Where any damage or injury happens to the passengers by the breaking down or overturning of the coach or by any other accident occurring on the road, the presumption *prima facie* is that it occurred by the negligence of the coachman; and the *onus probandi* is on the proprietors of the coach, to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and human limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proof, every imputation thereof."

But these instructions do not stand alone; and when they are [3] considered with the other instructions touching the measure of defendants' duty, we are impelled to the view that the jury could not have misunderstood. In the plainest language they were told that proof of the accident cast upon the company the burden of its own exoneration; that it owed to the plaintiff as a passenger the highest degree of care; that such degree of care was required in the inspection of its equipment, including the register strap and involved the duty to keep its equipment in repair, and to anticipate all such results as might reasonably be expected in view of the conditions under which the equipment might be used. As this correctly expresses the common law of the subject, we are not disposed to order a retrial because of error in the instructions.

3. The case was submitted to the jury as though the evidence [4] touching the inspection was sufficient, if true, to rebut the presumption of negligence which arose on proof of the accident. This was error. So far as the register strap is concerned, the only suggestion of an inspection is made by Vickery, who says:

Direct examination: "That car went out about 12:30 on the 30th in good condition. Q. Were the straps in good condition? A. As far as I could learn and see."

Cross-examination: "I went through to see if any straps were broken out, or missing, or bad straps. I didn't go around and jerk on the straps to see if there was any weak straps in there. I looked at the bell cord and turned the lights on. That was all I did in inspecting the straps. Q. Looked at them? A. Yes, sir."

Redirect: "I worked on and inspected car 4 on April 30, 1913, the day of the accident—in the morning some time. I was inspecting the controllers, and repaired the controllers, and inspected the car in general at that time. Q. Were you in the interior of the car where the straps were? A. Yes, sir. Q. Did you inspect the straps in that particular? A. Yes, sir. Q. Did you find anything wrong with the car? A. No, sir."

Recross-examination: "All of my inspection on the 30th of April was on the controllers, inside of the car. As I remember it my entire inspection was confined to that. \* \* \* I don't remember what I did to the controllers. I remember looking at the brushes and the motor through the car in general. I don't remember anything else. I have told you all that was ever done on this occasion on this car."

Whether the strap broke below the rivet or pulled through the rivet is the subject of some contention; but it is of little consequence. The important fact is that it gave way, caused the conductor to lose his balance and to fall upon the plaintiff, and Vickery, it will be observed, does not intimate that weakened defects, short of actual breakage, could have been discovered by any such inspection as he gave the straps, or could not have been discovered by submitting them to scrutiny or to some practicable test. His inspection as he describes it may have been merely a sweeping glance. The safety and comfort of people who pay for their transportation by a common carrier require something more than this, and something more than this was practicable. In use the straps were to be jerked with suffi-

cient force to work the register, and an obvious test of their efficiency for that purpose was to put them through that operation. That such a test probably would, that even a close and careful scrutiny might have revealed the weakness is to be gathered from the defendants' own case, for King, the conductor in whose hands the strap gave way, says:

"I got hold of this strap and I rang it up in the usual manner, and so far as I could tell the rivet pulled out and the strap pulled loose some way. I don't know just how, and I lost my balance and fell over toward the side of the car. \* \* \* I could not say that I pulled the strap more than once. \* \* \* I did not use any more force than I ordinarily would in ringing up fares. \* \* \* I have no recollection at all of how many times I pulled. \* \* \* I don't remember anything about the register not working. \* \* \* I don't recall that I pulled it once and it didn't work and got hold of it again and gave it a sudden jerk. \* \* \* I am not positive whether the strap broke in two or whether it pulled off in the rivet." We have quoted the rule at the common law as stated by Story, and we subjoin a version of the same rule as applied to street railways by a modern authority: "While street railroads, as common carriers, are not insurers of the absolute safety of their passengers and do not insure them against all hazards incident to their transportation, they are required to exercise, through their servants, a very high degree of care, skill, diligence and foresight, such as should be exercised by very careful and skillful railroad employees, to avoid injury and loss of life to those whom they undertake to carry as passengers, and for injuries resulting from a failure of duty in this regard they are liable. \* \* \* The inspection of its cars and appliances, roadbed and machinery must be such as, in the judgment of those who understand the subject, will be sufficient to secure, or such as experience has shown to be sufficient to secure, the safety of its passengers. Where an accident happens to a passenger by the breaking of one of the railway company's appliances, the burden is upon it to show affirmatively a condition of things which



would exonerate it from liability." (1 *Nellis on Street Railways*, secs. 274, 290.) Under this rule, the defendants' showing of care by reason of inspection was insufficient as a matter of law. (See *Weir v. Union Ry. Co.*, 112 App. Div. 109, 98 N. Y. Supp. 268; *Leonard v. Brooklyn Heights Ry. Co.*, 57 App. Div. 125, 67 N. Y. Supp. 985; *Smith v. Metropolitan St. Ry. Co.*, 59 App. Div. 60, 69 N. Y. Supp. 176; *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870; *Treadwell v. Whittier*, 80 Cal. 574, 585, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266; *Texas etc. Ry. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406; *Palmer v. President etc. of D. & H. C. Co.*, 120 N. Y. 170, 17 Am. St. Rep. 629, 24 N. E. 302; *Gerlach v. Detroit United Ry.*, 171 Mich. 474, 137 N. W. 256; *Texas etc. Ry. Co. v. Allen*, 114 Fed. 177, 52 C. C. A. 133.)

What importance this aspect of the case may have assumed in the deliberations of the jury we can only infer from the fact that the evidence and the instructions commanded a verdict for the plaintiff in some amount, unless the defendants, by reason of the so-called inspection, had exonerated themselves from all blame. It is true we may question the extent of plaintiff's injuries attributable to the accident; but that is a pure gratuity, for there was ample evidence to show substantial damage, as there was sufficient to warrant the view that the damage was only nominal. We may not upon this record assert that the correct result was reached because of our doubt upon the question of damages.

According to the theory on which the case was tried, the defendant King was not at fault, because he had nothing to do with the defective condition of the strap. So far as he is concerned, the judgment must be affirmed; but as to the other defendants, the judgment and order appealed from are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I dissent. Assuming that we are bound by the theory of the case adopted in the trial court and that such theory was erroneous, I am unable to subscribe to the doctrine announced by the majority which furnishes the only ground for a reversal of the judgment.

In negligence cases, inspection is never required for its own sake. It is but a means to an end, and whenever it appears that reasonable inspection would not disclose the latent defect which is ultimately responsible for an injury, a failure to make such inspection does not constitute negligence.

There cannot be any dispute upon this record that the only purpose the strap in question was designed to serve was to operate the lever which in turn caused the registering device to record the fare. It was not intended to sustain the weight of a man or to resist any strain which might be put upon it. Since its purpose was to operate the lever, the utmost that could have been required of an inspector was that he should test it by moving the lever, and had he done so, it would have responded to the test for all that appears from this record, and the company would have been acquitted of the charge of negligence under the theory adopted by the plaintiff. There is not any contention made by plaintiff that the strap broke by reason of the application of such force as ordinarily worked the lever. Plaintiff herself and her witnesses Donaldson and Reeves testified that when the conductor sought to register a fare, something apparently was wrong with the mechanism of the registering device, for it failed to work, and the conductor then gave the strap a second hard pull or jerk, which caused it to give way. If then, according to plaintiff's own theory, the strap broke only because it was subjected to more than the ordinary force, it cannot be said as a matter of law that a proper inspection would have disclosed the defect, if any, in the strap; on the contrary, the evidence tends strongly to negative the idea that any reasonable inspection would have been productive of result.

I am unable to agree with the majority that what the witness Vickery did was not any inspection at all. It was for the jury to say, from all the facts and circumstances, whether an inspection was made, and, if not made, whether the failure to make one, under the circumstances, constituted negligence. -

Assuming, further, that plaintiff was entitled to nominal damages, the failure of the jury to make such award is not a ground for a new trial. An appellate court will not reverse a judgment in order that nominal damages may be recovered. *De minimis non curat lex.*

If upon the entire case as presented the correct result was reached, a new trial should not be granted. In denying a new trial the lower court must have passed upon the question of the sufficiency of the evidence to warrant a verdict for substantial damages. If in the opinion of that court such damages should not have been awarded, its order denying a new trial should be upheld, for certainly this court cannot say that the evidence presents a case calling for more than nominal damages.

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PUBLIC SERVICE COMMISSION, APPELLANT, v. CITY OF  
HELENA ET AL., RESPONDENTS.

(No. 3,830.)

(Submitted June 23, 1916. Decided July 17, 1916.)

[159 Pac. 24.]

*Public Service Commission—Cities and Towns—Water Plants—  
Powers—Constitution—Police Power.*

*Cities and Towns—Water Plants—Indebtedness—Powers.*

1. The power exercised by a city under section 3259, subdivision 64, to issue bonds and procure, own and control a water system, is proprietary in character, as distinguished from its governmental capacity.

*Same—Water Plants—Control by State.*

2. Where a city acquires a water supply without resort to indebtedness beyond the constitutional three per cent of the city's taxable property, it stands on an equal footing with an individual or private corporation engaged in furnishing water to it and its inhabitants, and is

subject to all reasonable regulation and control by the state under the police power.

Same—Water Plants—Regulation by Public Service Commission.

3. A city which has acquired a water supply by resorting to the extended limit of indebtedness is not thereby exempted from control and regulation by the state through the agency of the Public Service Commission under Chapter 52, Laws of 1913.

Same—Water Plants—Indebtedness—Constitution.

4. Under the rule that, since the state Constitution limits, rather than grants, power, any provision of that instrument open to construction should be held to come within the general rule, unless a contrary conclusion is forced by the circumstances of the particular case, held that the provision of section 6, Article XIII, of the Constitution, relative to ownership and control of a water supply procured through resort to the extended limit of indebtedness, and application of revenue therefrom, must be understood as expressing constitutional restrictions imposed as a condition to the exercise of the privilege implied in the provision for extended indebtedness, and not as a grant of power not enjoyed by a city acquiring a water system without incurring additional indebtedness.

Constitutional Law—Police Power.

5. Though no specific provision of the Constitution forbids it, the legislature is without authority to surrender altogether the police power.

Cities and Towns—Police Power.

6. However positive the terms of the grant of police power to a municipality, the state will be held to have retained its original jurisdiction over the same subject, and to possess the authority to exercise it concurrently with the municipality.

Same—Public Service Commission—Constitution.

7. Chapter 52, Laws of 1913, creating a Public Service Commission and defining its powers, does not infringe the provision of section 36, Article V, of the Constitution, prohibiting the delegation of certain powers to special commissions, the Public Service Commission not being a "special commission" within the meaning of that section.

Same—Water Rentals—Not Taxes.

8. Chapter 52, Laws of 1913 above, does not run counter to section 4, Article XII, of the Constitution, prohibiting the legislature from levying taxes for municipal purposes, no tax being actually levied by the commission and the regulation of water rentals not constituting a levy of taxes.

Same—Public Service Commission—Regulations must be Reasonable.

9. Regulations made by the Public Service Commission must be reasonable in order to be valid, and any regulation which imposes upon a city an obligation which is invalid is not reasonable.

Same—Water Plants—Constitution—"Revenues"—Definition.

10. The "revenues" referred to in section 6, Article XIII, of the Constitution, which must be devoted to a discharge of the indebtedness incurred in procuring the water system, are the net revenues,—the gross receipts less the necessary operating expenses,—against which the expense of regulation by the Public Service Commission, if reasonable, is chargeable.

Same—Public Service Commission—Powers—How to be Construed.

11. Chapter 52, Laws of 1913, conferring authority upon the Public Service Commission, must be construed in harmony with the theory of self-government in cities and the retention of police power by the state.

Same—Water Plants—Control and Supervision.

12. Chapter 52 does not take away from a city the active management of its water plant or the authority to appoint or supervise the officers and employees necessary to operate it.

[As to *mandamus* or prohibition to control act of Public Service Commission, see note in *Ann. Cas.* 1914D, 795.]

*Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.*

PROCEEDINGS by the Public Service Commission of Montana against the City of Helena and its executive officers. Judgment for defendants and plaintiff appeals. Reversed and remanded.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, for Appellant, submitted a brief; *Mr. Alvord* argued the cause orally.

The business of furnishing water to the inhabitants of a city is a business charged with a public interest.

We deem it unnecessary to do more than to enumerate the various tests by which the courts have determined whether or not a particular business is a public utility. They are: 1. That the business in question is essentially a legal monopoly (*Allnutt v. Inglis*, 12 East, 527; 104 Eng. Reprint, 206). 2. Exercise of the right of eminent domain by the person or corporation carrying on the business. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. (Section 14, Article III, of the Constitution.) 3. The use of the public highways for the laying of mains by the corporation or individual furnishing the service; the bestowal of a special privilege or franchise raises an obligation to serve the public. (*Cincinnati, H. & D. Co. v. Village of Bowling Green*, 57 Ohio St. 336, 41 L. R. A. 422, 49 N. E. 121.) 4. In case of cities and towns, an exercise of the delegated right of taxation for the purpose of obtaining public utility plants. Taxes shall be levied and collected by general laws and for public purposes only. (Section 11, Article XII, Constitution.) All

of the above enumerated privileges come from the state directly. Without legislative authority no person or corporation is entitled to use them.

A city furnishing water is a public utility within the definition above quoted. (*Brumm's Appeal*, 12 Atl. 855; *Nourse v. City of Los Angeles*, 25 Cal. App. 384, 143 Pac. 801.) All of the cases, whether they so state directly or not, proceed upon the theory that the municipality in holding property of this nature has the *status* of a legal individual, and its political nature does not enter into the question. (*Lloyd v. Mayor etc. of New York*, 5 N. Y. 369, 55 Am. Dec. 347.) In view of the language of this court in *Milligan v. Miles City*, 153 Pac. 276, and of the numerous courts which have passed upon this question, a city in its ownership of property devoted to a public use does so as a legal individual subject to all the rights and liabilities to which any other person or corporation owning property of a like nature is.

Public utilities or businesses charged with a public interest are subject to control by the state under its police power. (*Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77; *City of Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 116 Am. St. Rep. 944, 9 Ann. Cas. 819, 8 L. R. A. (n. s.) 529, 108 N. W. 65.) And the cases universally hold that water companies come within this rule. (*Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.)

The cases supporting this doctrine and showing that waterworks are subject to public control are collected in a case note in 61 L. R. A. 100. (See, also, *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696, 21 Sup. Ct. Rep. 505.) It is equally well established that whenever there is any doubt as to the reservation of the power in the state, it must always be resolved in favor of the public. (*Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493; *Stone v. Yazoo & M. R. Ry. Co.*, 62 Miss. 607, 52 Am. Rep. 193; *Georgia Ry. & Bk. Co. v. Smith*, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. Rep. 47; *City of Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295.)

We contend that the language of section 6, Article XIII, of the Constitution does not abrogate the power of the state to control the city in the use of its property. Exemption from such control can be assumed only from clear and express grant, never by implication. The state must not be held to have granted away or abrogated its police power, if there is any other reasonable construction to be put upon the language. (See cases last above cited.)

Neither do the provisions of section 36 of Article V apply to a property held by a city in its capacity as a private corporation. Its protection from legislative interference as to such property rests in the constitutional guaranties found elsewhere in the Constitution. Hence control by the public service commission of the service and rates rendered by the city in operating a water plant is not a supervision or interference with municipal improvements, moneys, property, effects or the performance of a municipal function, within the prohibition of that section.

The provisions of Chapter 52 of the Laws of 1913 do not involve an exercise of the taxing power of the state for municipal purposes, contrary to section 36 of Article V, or section 4 of Article XIII, of the Constitution. (*Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Chicago v. Northwestern Mut. Life Ins. Co.*, 218 Ill. 40, 1 L. R. A. (n. s.) 770, 75 N. E. 803; *Ukiah v. Ukiah Water & Imp. Co.*, 142 Cal. 173, 100 Am. St. Rep. 107, 64 L. R. A. 231, 77 Pac. 773.)

*Mr. Edward Horsky*, for Respondents, submitted a brief and argued the cause orally.

Chapter 52, Thirteenth Session Laws, is in direct conflict with section 6 of Article XIII of the Constitution. When the people in their Constitution said to subsequent legislatures: "Where a city extends its debt limit over the three per cent limit, it shall own and control, and devote the revenue derived therefrom to the payment of the debt," not only was city ownership and control made mandatory, but a limitation was imposed upon the legislature itself from directly, or in-

directly, interfering with such ownership and control; and any other agency than the city itself was excluded from exercising acts of control or ownership.

Local self-government: "The legislative Act authorizing the district court to appoint trustees of waterworks in cities of the first class is invalid as taking from the city the right of local self-government." (*State v. Barker*, 116 Iowa, 96, 93 Am. St. Rep. 222, 57 L. R. A. 244, 89 N. W. 204; Dillon on Municipal Corporations, sec. 58.) The same rule prevails in Indiana, where a statute providing for the appointment of fire commissioners by the legislature was held unconstitutional as depriving the people affected by it of the right of local self-government. (*State v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274; *People ex rel. Board v. Common Council*, 28 Mich. 228, 15 Am. Rep. 202; *Rathbone v. Wirth*, 6 App. Div. 277, 40 N. Y. Supp. 535.) Counsel endeavor to circumvent local self-government by claiming that it is applicable to only "municipal functions," and make reference to the familiar rules that a city has two classes of powers, namely, public or governmental and private business functions; citing *Bailey v. Mayor*, 3 Hill (N. Y.), 531, 538, 38 Am. Dec. 669; *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276. It is interesting to note that the case of *Bailey v. Mayor*, involves a water plant, and was cited in *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382; while among other cases cited in the Milligan decision is that of *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382, which expressly decided that a municipally owned water plant, as in the case at bar, is a matter of purely business or private concern. Later the case of *State ex rel. Gerry v. Edwards*, 42 Mont. 135, Ann. Cas. 1912A, 1063, 32 L. R. A. (n. s.) 1078, 111 Pac. 734, held likewise. So that in both the *Steele* and *Gerry Cases*, a city water plant and city parks were held solely matters of private concern and local in nature, as distinguished from those public or governmental in nature. (See, also, *Porter v. Shields*, 200 Pa. 241, 49 Atl. 785.)

Police power: Though the police power is inherent in the



state, the exercise of such power in the enactment of laws is, nevertheless, subject to certain limitations, to-wit: Such laws shall not be repugnant to the provisions of the state Constitution itself, nor to the federal constitution and laws made under its powers. (8 Cyc. 865; Cooley on Constitutional Limitations, 574; *People v. Gillson*, 109 N. Y. 389, 400, 4 Am. St. Rep. 465, 17 N. E. 343; *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143, 145; *Martin v. Hunter's Lessees*, 1 Wheat. (U. S.) 304, 326, 4 L. Ed. 97; *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234, 235.)

Compulsory obligations and new liabilities: The law is also unconstitutional because it imposes compulsory obligation, and imposes new liabilities in respect to transactions or considerations already passed. (*Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382; Constitution, Art. XII, sec. 4; Art. XV, sec. 13.) The expense to be incurred must be met either by taxation or taking it out of the revenues of the plant. The power to tax or to impose a compulsory obligation upon a municipality involving a taxation is the exercise of legislative authority, which can only be delegated to the corporate authorities, that is, to the city council. (*Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382; *State ex rel. Gerry v. Edwards*, *supra*.) The Public Service Commission of Montana is not one of the corporate authorities of the city of Helena. "By the term 'corporate authorities' is meant those who constitute the legislative branch of the city government, the mayor and city council." (*State ex rel. Gerry v. Edwards*, *supra*; *Lovington v. Wider*, 53 Ill. 302, 304; *People v. Mayor etc. of Chicago*, 51 Ill. 17, 30, 2 Am. Rep. 278; *People v. Knopf*, 171 Ill. 191, 49 N. E. 424, 426; *Harward v. St. Clair etc. Drainage Co.*, 51 Ill. 130, 133; *Wider v. City of East St. Louis*, 55 Ill. 133.) "The power cannot be delegated to a private individual or private corporation nor to officers of the corporation as such." (23 Cyc. 1660 (17), citing: *Harward v. St. Clair etc. Drainage Co.*, 51 Ill. 130; *People v. Mayor etc. of*

*Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *East St. Louis v. Zebbley*, 110 U. S. 321, 324, 28 L. Ed. 162, 4 Sup. Ct. Rep. 21; *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *State v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *Blades v. Board of Water Commissioners*, 122 Mich. 366, 81 N. W. 271, 272.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

By Chapter 52, Laws of 1913, a Public Service Commission for this state was created and its powers and duties defined. The city of Helena declined to submit to the supervision of the commission over its water system, and this controversy found its way into court, where it was decided in favor of the city and its executive officers. The commission has appealed.

1. Section 6, Article XIII, of our state Constitution, limits the indebtedness which a city may contract to three per cent of the value of the taxable property therein, but provides that the legislature may authorize an increase over that limit "when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." By subdivision 64, section 3259, Revised Codes, the legislature made available this extraordinary privilege, and the city of Helena, already indebted to the full extent of the three per cent limit, issued its bonds to the amount of \$400,000, and from the proceeds purchased its [1] present water system. In the ownership and control of that water system, the city acts in its proprietary character, as distinguished from its governmental capacity. (*Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382.) If the city had acquired this water plant without [2] resort to the extended limit of indebtedness, there is not any question that it would then have stood upon an equal footing with an individual or private corporation engaged in furnishing water to a municipality and its inhabitants (*Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276), and would have been

subject to all reasonable regulation and control by the state, acting in virtue of its police power. (*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Spring Valley W. W. v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.)

But the city contends that, having acquired its water supply by extending its indebtedness beyond the three per cent limit [3, 4] as authorized by the Constitution and statutes, it occupies a more favorable position than the prudent and provident city which purchases its water plant and keeps within the three per cent limit, in that it is enjoined by the language of the concluding sentence of section 6, Article XIII, above, to own and control such water supply; and, since this language of the Constitution is mandatory and prohibitory, it must be held to mean exclusive ownership and exclusive control, and therefore the city could not, if it would, admit of any interference with its water supply by anyone else; and, if Chapter 52 assumes to clothe the Public Service Commission with authority to supervise or control the management of such water supply thus acquired, it runs counter to the provision of the Constitution above, and must be held to be invalid.

A determination of the proper construction to be given to the language of section 6, Article XIII, quoted above, will lead to the solution of this controversy. It must be conceded that there is some distinction made in the Constitution between the city owned water supply purchased by extending the municipal indebtedness beyond the three per cent limit, and the city owned water supply acquired without exceeding that normal limit. The Constitution concerns itself with the first as it does not with the second. The city able to procure a water plant and keep within the three per cent limit is free to proceed without danger of collision with any provision of the Constitution. It is only when a city already burdened with an indebtedness equal to three per cent of the value of the taxable property therein seeks the privilege of increasing that burden that the Constitution interposes with the declaration that such additional indebtedness may be authorized by the legislature, and a favorable vote of

the taxpayers affected, "when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." Does this reference to ownership, control and application of revenue constitute a special grant of power to the city, or is it a limitation upon the authority of the city so unfortunately situated? Was it the purpose of the framers of the Constitution thus to specially favor such city, or was it the purpose to authorize the extension of indebtedness above the normal limit only on condition that ample provision be made for the discharge of such extraordinary burden; in other words, is the reference to ownership, control and application of revenue to be understood as expressing constitutional restrictions imposed as a condition to the exercise of the privilege implied in the provision for extended indebtedness?

Other things equal, a court should not hesitate to pronounce this concluding sentence of section 6, Article XIII, a limitation of power rather than a grant; for our state Constitution was intended to express the limitations which the people set upon the various agencies of government—even upon themselves. All political power is vested in and derived from the people, and therefore we should not expect to find in the Constitution any grant of power from the people to themselves, either directly or through any governmental agency. Though some provisions assume the form of grants, in reality they but delimit the power or authority to which they refer. Every reference in the Constitution to public indebtedness is coupled with a limitation upon the power to incur indebtedness. The elaborate provisions for the security of the people of the state, and of every political subdivision, against their own possible improvidence constitute one of the distinguishing features of our fundamental law. Since it is the rule that the Constitution limits, rather than grants, power, any provision open to construction should be held to be within that general rule, unless a contrary conclusion is forced by the circumstances of the particular case.

Another consideration leads to the same end. In the people of this state is lodged its police power, one of the highest attributes of sovereignty. The exercise of this power is deemed essential to the good order and general welfare of organized society, and so jealous are the people in their retention of the power that, though no specific provision of the Constitution forbids it, the [5] legislature is without the authority to surrender it altogether. (*Helena L. & R. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446; *Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341.) We do not say that the people of the state cannot by constitutional provision divest themselves of the right to exercise the power with respect to any particular subject, but we do say that for them to do so would be contrary to the policy pursued in every civilized nation. While the state may employ agencies through which to exercise the power, its absolute abdication to any such agency—the clothing of the agency with the exercise of the power to the exclusion of the state itself—is all but unheard of in our jurisprudence.

However positive the terms of the grant of police power to [6] the municipality, for instance, the state will be held to have retained its original jurisdiction over the same subject and to possess the authority to exercise it concurrently with the municipality. (*Seibold v. People*, 86 Ill. 33; *Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.) Speaking upon one phase of this subject, the supreme court of the United States said: "This power of regulation is a power of government, continuing in its nature, and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the \* \* \* power. In the words of Chief Justice Marshall in *Providence v. Billings*, 4 Pet. (U. S.) 514, at page 561 (7 L. Ed. 939): 'Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied

are numerous." (*Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 631, 636, 6 Sup. Ct. Rep. 334, 388, 1191.)

If the language of the concluding sentence of section 6, Article XIII, above, should be held to secure to the city of Helena the control of its water system to the exclusion of everyone else, the state included, it follows as of course that the state has surrendered to the city all police power with reference to such system, and that, if it should transpire that the water supply became contaminated, spreading contagious disease generally, the state would be helpless and could not interfere. We decline to adopt such a construction, since, as we view it, the language of the constitutional provision does not lead to that conclusion.

When we consider that the privilege of extended indebtedness is open only to the city whose business management has resulted in a burden of debts, it would seem fair to presume that, instead of admitting such city to the extraordinary freedom of action for which respondents contend, it was the intention of the framers of section 6, above, to hedge about such city with restrictions conducive to the security of the additional indebtedness and its ultimate discharge. It certainly cannot be said that the injunction of section 6, above, that the revenues derived from such water system shall be devoted to the payment of the extended indebtedness, secures to the city any special privilege. On the contrary, that language is not susceptible of any meaning other than that the city is prohibited from dissipating the funds derived from the operation of its water system or using them for general municipal purposes, and is commanded to devote them to the single purpose indicated. It is strictly a limitation imposed in the interest of the city and the holders of its securities. But this injunction is employed in the same connection as the direction to the city to own and control such water system, and in our opinion this reference to ownership and control is likewise but an inhibition upon the city in the interest of its credit, and not a limitation upon the power of the legislature to direct the exercise of the state's police power. It is not necessary to determine whether a city operating without the dis-

ability imposed by this extended indebtedness could sell its water plant or let its operation to an individual or private corporation; but, in its own interest and the interest of its bondholders, the city laboring under such disability is forbidden to part with title to its water plant and thus possibly lessen the security behind the bonds, and it is likewise prohibited from parting with control and thus sharing the profits of operation with anyone, so long as the disability remains. The entire plant is set apart for and devoted to the ultimate discharge of the extraordinary indebtedness.

To follow the argument advanced in behalf of respondents to its logical conclusion: The city of Helena is in the specially favored class only because it was compelled to resort to the extended indebtedness to procure its water supply. As respects that water supply, it will always remain in that class. There is no provision for removing it, even though it discharges its extraordinary indebtedness and reduces its original obligations well below the three per cent limit, and is otherwise in the same situation as the city that owns its water plant but never exceeded the normal limit. What is to become of the revenue from the plant after the city discharges the indebtedness, if the strict construction of the concluding sentence of section 6 is to be applied as counsel for respondents contend? Our construction of that language seems to us reasonable. It is in harmony with the general character of the Constitution as a whole, and it avoids the all but absurd assumption that the state intended to surrender its police power under circumstances where the necessity for its retention would be augmented rather than lessened.

2. Chapter 52 above does not infringe the provisions of section 36, Article V, of the Constitution. The Public Service Commission is not a special commission, within the meaning of those terms as employed in section 36 above. In many of the states of this country, the theory of local self-government for municipalities does not prevail, but, on the contrary, the power of the legislature to appoint or control municipal officers is asserted. (28 Cyc. 295.) For instance, by an Act approved

March 12, 1861, the legislature of Minnesota provided for an extension of Fort Street, St. Paul, and in section 2 of the Act named Nathaniel McLean, J. W. Selby and Parker Paine commissioners to carry out the requirements of the Act. (*Laws of Minnesota*, 1861, p. 255; *Daley v. City of St. Paul*, 7 Minn. 390 (Gil. 311).) By an Act approved November 25, 1885, the legislature of Oregon amended the Act incorporating Portland. By section 142 of the amended Act, the city was authorized to procure a water supply for itself and its inhabitants. By section 143, John Gates, F. C. Smith, C. H. Lewis, Henry Failing, W. S. Ladd, Frank Dekum, L. Fleischner, H. W. Corbett, W. K. Smith, J. Lowenberg, S. G. Reed, R. B. Knapp, L. Therkelson, Thomas M. Richardson and A. H. Johnson were named as a "water committee" with power to purchase or construct the water plant and to that end to issue bonds of the city, etc. (*Laws of Oregon* (Sp. Sess.) 1885, p. 97; *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174.) Many other examples might be cited, but these suffice to indicate the character of legislation against which the provision in section 36, Article V, above was directed. (*People v. Hoge*, 55 Cal. 612; *In re Pfahler*, 150 Cal. 71, 11 Ann. Cas. 911, 11 L. R. A. (n. s.) 1092, 88 Pac. 270.)

3. Neither does this Act conflict with section 4, Article XII. [8] It does not levy any tax upon the city of Helena or its inhabitants. Even the regulation of water rentals would not amount to a levy of taxes, for a water rental is not a tax. (*Wagner v. City of Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.) Whether a particular regulation of the Public Service Commission may have the effect of imposing a compulsory obligation on the city is another question. Any regulation [9] which the commission makes must be reasonable in order to be valid, and any regulation which imposes upon the city any obligation which is invalid is not reasonable. Whether the regulation sought to be imposed upon the city of Helena, with reference to the character of the accounts to be kept with respect to its water system, is reasonable depends upon considera-



tions not presented by this record. Assuming it to be reasonable, it does not follow that it will impose upon the city of Helena any obligation whatever.

The "revenues" from the water plant referred to in section [10] 6, Article XIII, above, which are to be held inviolate—dedicated to the discharge of the extraordinary indebtedness—are the net revenues or the gross receipts less *necessary* operating expenses, and, if this regulation of the commission is a reasonable one, the extra expense incurred in carrying it into effect is a proper and necessary charge against the gross revenues derived from the water system, and not an obligation imposed upon the city at all.

Rather than declare a solemn enactment of the legislature invalid, we will construe its provisions in harmony with the Constitution if possible to do so. The principle of local self-government as declared by this court in *Helena Con. W. Co. v. [11] Steele*, above, and in later cases, does not exclude the state from the exercise of police powers within a city of this state.

The language of Chapter 52 above, conferring authority upon the Public Service Commission, is to be construed in harmony with the theory of self-government in the city and the retention of police power by the state.

At first blush, the concluding sentence of section 3 of Chapter 52, to-wit, "And the Public Service Commission is hereby in [12] vested with full power of supervision, regulation and control of such utilities, subject to the provisions of this Act and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village," might seem to contemplate the complete substitution of the Public Service Commission for the city in the management and control of its water system; but a consideration of the entire Act leads us to the conclusion that it was the intention of the legislature to go no further than to provide that, within the limited sphere of its jurisdiction, the Public Service Commission may make reasonable regulations which the city must heed, and to that extent

only is the authority of the city superseded, but that it was ever intended to take from the city the active management of its water plant or the authority to appoint the proper officers and employees to operate it, or to interfere with such officers in the proper discharge of their duties, we cannot admit.

From necessity we are compelled to pass upon the general character of the legislation found in Chapter 52 above, rather than upon the particular provisions of the Act. Whether the legislature exceeded its authority in attempting to confer upon the Public Service Commission any other particular power can only be determined when the exercise of that power is called in question directly. So far as the objections now urged against it are concerned, Chapter 52 appears to be a valid legislative enactment.

The judgment is reversed and the cause is remanded for further proceedings not in conflict with the views herein expressed.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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MOORE, RESPONDENT, v. SHERMAN ET AL., DEFENDANTS;  
PUMP, APPELLANT.

(No. 3,675.)

(Submitted May 18, 1916. Decided July 17, 1916.)

[159 Pac. 966.]

*Water Rights—Abandonment—Nonuser—Estoppel.*

**Water Right by Appropriation—Is Property.**

1. A water right acquired by appropriation is property which at the death of the appropriator passes to his successor.

**Same—Abandonment—What Constitutes.**

2. Abandonment of a water right, being a matter of intention, cannot exist in the absence of an intention to abandon.

**Same—Nonuser—Effect.**

3. Nonuser of a water right for the period of the statute of limitations does not constitute abandonment of it.

**Same—Abandonment—Estoppel.**

4. To uphold S.'s contention that P., the owner of a water right, was estopped to claim the right or to say that there was no intention on her part to abandon it, some representations must have been made or some position assumed by the latter upon which the former, having a right to do so, relied in good faith, and from which inequitable consequences must flow if the representations be repudiated or the position be changed.

**Same—Estoppel by Silence.**

5. Before silence alone can work an estoppel, the person to be estopped must have had an intent to mislead or a willingness that another should be deceived, and the latter must have been misled by the silence.

[As to estoppel by acquiescence of silence, see notes in 57 *Am. Rep.* 429; 10 *Am. St. Rep.* 22.]

**Same.**

6. Where no legal obligation rested upon a prior appropriator to make known his claim to a water right which he did not use, an estoppel cannot be claimed by a subsequent appropriator, even though he was injured by the recognition of the former right.

**Same—Subsequent Appropriation—Notice of Adverse Claim.**

7. A subsequent appropriation of water is not any notice of an adverse claim.

*Appeal from District Court, Meagher County; John A. Matthews, Judge.*

ACTION by Perry J. Moore against Roy O. Sherman and Helen Pump. From a decree in favor of defendant Sherman and an order denying her motion for a new trial, defendant Pump appeals. Modified and affirmed.

*Messrs. Walsh, Nolan & Scallon*, for Appellant, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

*Messrs. Henry C. and Park Smith*, for Respondent, submitted a brief; *Mr. Park Smith* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was instituted by Perry J. Moore to have determined the relative rights of several claimants to the use of the waters of the East Fork of Little Elk Creek, in Meagher county. Defendant Helen Pump was denied any right by virtue of a certain appropriation made by her predecessor in 1892, and it is

from the decree in so far as it denies this right, and from an order refusing a new trial that these appeals are prosecuted.

The trial court found that in 1892, F. Miller made an appropriation of fifty miner's inches for the irrigation of a desert claim then owned by him; that he used the water upon the land continuously until his death in 1903; that his widow, executrix of his last will, did not thereafter exercise such right at all; that in 1911 defendant Pump succeeded to the land and its appurtenances, and that she did not use the water nor assert any claim to the right up to the time she appeared in this action; that the ditch constructed in 1892 was suffered to become out of repair and to become overgrown and filled until it was practically indistinguishable upon the ground, was incapable of carrying water and gave no notice of its existence. Finding No. 15 is as follows: "That the said defendant Helen Pump did not show, or attempt to show, either by herself or her predecessors in interest, any use of the waters of Little Elk Creek through said 1892 ditch, or the exercise of act of dominion or ownership over the said ditch or water right by said Roy O. Sherman, but it does appear that neither the said Mrs. Miller, while managing said F. Miller estate, nor the said defendant Helen Pump, as successor in interest of said estate, had any conscious intent to abandon said ditch and water right, but, on the contrary, if they had any conscious thought on the subject, in their own minds did not intend to abandon the same, although said intention was not communicated, in any manner, to the public, and the said Mrs. F. Miller explained her failure to use the said water or ditch as being due to the amount of work involved in the management of said Miller estate property."

In what is denominated conclusion of law "E," the court declared that by failing "to so use any of said waters or to do any work upon said ditch and water right, and permitting, without objection or actual notice, third parties to initiate rights and place lands under cultivation and to cultivate the same for years, under the assumption that no such right existed and that the said right of 1888 was the only right claimed by said de-

fendant as appurtenant to her lands acquired from said F. Miller, and by a course of conduct, which would, in the absence of her statement to the contrary, show a clear intent and purpose to abandon said right and ditch, if any she had, the said defendant is declared to have failed to establish any right in and to the waters of said Little Elk Creek by reason of said ditch constructed in the year 1892, and to have forfeited any right which may have existed at the time of the death of said F. Miller, and to be estopped from asserting any such right as against the answering defendant Roy O. Sherman." This conclusion presents the court's explanation of the decree, in so far as it denied to this appellant any right based upon the Miller appropriation of 1892.

The right acquired by Miller by virtue of his appropriation [1] in 1892 was property. (*Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398.) It continued to be property to the time of his death and passed to his successor. The use of the term "forfeiture" in connection with the loss of this property right was doubtless a mere *lapsus linguae*. The right might be lost altogether by abandonment. It might be lost to another by adverse user or the owner of the property might become estopped to assert his ownership as against another, but "forfeiture," in the connection employed, is a misnomer. There is not any claim of adverse user—no finding upon it and no adjudication. The judgment must be sustained, if at all, upon a theory of abandonment or estoppel.

1. *Abandonment*: In *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054, this court quoted with approval the [2] following: "An abandonment is 'the relinquishment of a right, the giving up of something to which we are entitled.' (Bouvier's Law Dictionary.) 'Abandonment must be made by the owner, without being pressed by any duty, necessity or utility to himself, but simply because he desires no longer to possess the thing; and further, it must be made without any desire that any other person shall acquire the same; for, if it were made for a consideration, it would be a sale or barter, and, if without

consideration, but with an intention that some other person should become the possessor, it would be a gift' (Bouvier's Law Dictionary)"; and said: "Abandonment is a matter of intention." In *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059, we said: "'Abandonment is the giving up of a thing absolutely without reference to any particular person or purpose.' (1 Cyc. 4.) Neither party could abandon to the other, either with or without a consideration, for that would amount to a sale or gift. Abandonment is a matter of intention."

The court found that neither Mrs. Pump nor her predecessor, Mrs. Miller, intended to abandon the 1892 right, but, on the contrary, so far as they had any conscious intent, it was not to abandon either the ditch or water right. In the absence of any intention to abandon there could not have been an abandonment.

There was nonuser for ten years, but nonuser does not constitute abandonment. If any principle of the law of water rights can be settled, this one is. In *Smith v. Hope Min. Co.*, 18 Mont. 432, 45 Pac. 632, the court said: "The nonuser of water for so long a period, and especially a period longer than the statute of limitations, is certainly very potent evidence, if it stood alone, of an intention to abandon. Abandonment is a question of intention."

In *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751, the court said: "Mere lapse of time during which there is nonuser is not sufficient. The circumstances must be such as to justify an inference of intention to abandon; in other words, to leave the property to be taken by any other person who chooses to do so."

There was not any abandonment of the 1892 right, and the decree cannot be justified upon that theory.

2. *Estoppel*: There is not any plea of estoppel, but the pleadings were treated as amended to conform to the proof, and we are therefore to search the testimony for the facts which estop this appellant, if any such are disclosed by the record.

Either Mrs. Pump or her predecessor, Mrs. Miller, by her conduct might be estopped to say that she did not intend to [4] abandon the 1892 right, or that she has a present claim to that right, and the estoppel might result from action or nonaction, from silence or speech. "Where A has, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induced B to believe certain facts to exist, and B has rightfully acted on this belief, so that he will be prejudiced if A is permitted to deny the existence of such facts, A is conclusively estopped to interpose a denial thereof. The very essence of this doctrine is that the party relying upon the estoppel was misled to his prejudice by reason of the silence of the other party, when in equity and good conscience he ought to have spoken, or by reason of the affirmative acts or conduct of such other party." (*Kennedy v. The Grand Fraternity*, 36 Mont. 325, 25 L. R. A. (n. s.) 78, 92 Pac. 971.)

Defendant Sherman is the only one who is benefited by the decree in its present form; the only one to be injured by a recognition of the 1892 Miller right, and the only one contesting appellant's claim to that right; so that, if appellant is estopped to claim the right or if she or her predecessor is estopped to say she did not intend to abandon it, the elements constituting the estoppel must be found in some representations made or some position assumed, upon which defendant Sherman, having the right so to do, in good faith relied and from which inequitable consequences must follow if the representations be repudiated or the position be changed. (10 Rul. Case Law, 689.)

Constructive fraud underlies every equitable estoppel; "that is, the person estopped is considered as having by his admissions, declarations or conduct misled another to his prejudice, so that it would work a fraud to allow the true state of facts to be proved." (10 Rul. Case Law, 691.) The Sherman appropriations were made in 1907, when the Miller property was in charge of Mrs. Miller. The record contains all the evidence produced relative to the 1892 right, but there is not a suggestion that Mrs. Miller, this appellant or anyone else said or did

anything with reference to that right. Although Sherman testified at length with reference to the physical condition of the 1892 ditch, he did not intimate that in making his appropriations he relied upon an abandonment of the 1892 Miller appropriation or that he even considered the probability of that right being asserted or abandoned. So far as disclosed by this record, he was not misled at all. There is not even a bare scintilla of evidence that either Mrs. Miller or Mrs. Pump knew anything of Sherman's intentions, or of his appropriations, until long after they were made. The only inference to be drawn [5] from the evidence is that they kept silent and did not use the right. But mere silence cannot work an estoppel. To be effective for this purpose, the person to be estopped must have had an intent to mislead or a willingness that another should be deceived, and the other must have been misled by the silence. (10 Rul. Case Law, 693.)

If there was no legal obligation resting upon Mrs. Miller to [6] speak in 1907, or upon her or her successor thereafter to make known their claim, then no estoppel arose even though Sherman may now be injured by the recognition of the 1892 right. (10 Rul. Case Law, 692.) To create an obligation upon the part of Mrs. Miller to speak out in 1907, it was incumbent upon Sherman to show that she knew of his contemplated or actual expenditure of time and money in making his appropriations and that he was relying for any benefit to accrue from his efforts upon the assumption that the 1892 Miller right had been abandoned or would not be asserted to his prejudice. The record is barren of any such facts.

A subsequent appropriation of water is not any notice of an [7] adverse claim. Assuming that Mrs. Miller knew of Sherman's contemplated expenditures in 1907, she was not called upon to assert her rights or to notify him of their existence. The validity of his appropriations could not be made to depend upon the extent of prior appropriations. The conclusion that appellant is estopped cannot be justified by this record.



Upon the findings made, the trial court should have awarded appellant fifty miner's inches or one and one-fourth cubic feet per second of time. A new trial is unnecessary and the order refusing it will be affirmed. The cause is remanded to the district court with directions to modify the decree so as to award to appellant fifty miner's inches or one and one-fourth cubic feet per second of time of the waters of the East Fork of Little Elk Creek, and when thus modified, the decree will stand affirmed. The appellant will recover her costs of appeal.

*Modified and affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied September 19, 1916.

**CASES DETERMINED**  
**IN THE**  
**SUPREME COURT**

**AT THE**  
**OCTOBER TERM, 1916.**

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**THE HON. THEODORE BRANTLY, Chief Justice.**

**THE HON. SYDNEY SANNER,**

**THE HON. WILLIAM L. HOLLOWAY,**

} **Associate Justices.**

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**IN RE SATTERTHWAITE.**

(No. 3,930.)

(Submitted October 2, 1916. Decided October 4, 1916.)

[160 Pac. 346.]

*Habeas Corpus — Juvenile Delinquents — Petition — Citation —  
Jury Trial — Judgment.*

**Juvenile Delinquents—Petition—Contents.**

1. The petition to have a juvenile delinquent committed under the provisions of Chapter 122, Laws of 1911, must, among other things, charge that the persons having the custody of the child are unfit, unwilling or unable to care for, educate, control or discipline it, or that their consent has been obtained that the delinquent might be taken from them.

**Same—Citation—Failure to Serve—Effect.**

2. The person from whose custody a child is intended to be taken under the Juvenile Delinquent Act must be made a party and receive notice by citation; failure to give it will render subsequent proceedings void.

**Same—Jury Trial.**

3. Where the mother of an alleged delinquent daughter was not accorded the opportunity to exercise, or waive, the right to a jury trial conferred by Chapter 122, Laws of 1911; and the record failed to disclose whether a jury trial was had, and whether the accused waived

her right to such a trial or was apprised of it, the judgment committing her to a reformatory institution *held* void on *habeas corpus*.

~~Same~~—Judgment—Contents.

4. Before a delinquent child can be taken from its parent or guardian, the court must adjudge the unfitness, unwillingness or inability of the latter to properly care for it, and that it is for the best interest of the child and for the people of the state that it be given over to the custody of the state.

[As to validity of statute creating juvenile court, see note in *Ann. Cas.* 1914A, 1227.]

Application by Margaret Satterthwaite for a writ of *habeas corpus* in behalf of Mamie Satterthwaite. Complainant ordered released from custody.

*Mr. D. H. Wittenberg*, for Complainant.

*Mr. Wm. H. Poorman*, Assistant Attorney General, for the State; *Mr. J. A. Walsh*, appearing as *Amicus Curiae*.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On April 12 of this year, the chief probation officer of Silver Bow county presented to the district court a petition charging Mamie Satterthwaite, a minor child under the age of seventeen, with delinquency. A judgment was rendered finding the allegations of the petition to be true, and the child was committed to the House of the Good Shepherd at Helena, an institution for delinquent children. Upon application of the mother of the child this court issued a writ of *habeas corpus*, and, return thereto having been made, the matter was submitted for decision.

It is the contention of the mother that the record of the trial court discloses on its face such a disregard for the statute or such deviations from the procedure prescribed by law, as to render the judgment void.

1. *The Petition.* The Act relating to juvenile delinquents was [1] approved March 7, 1911. (Laws 1911, Chap. 122, p. 320.) Section 4 provides that a proceeding for the trial of an alleged delinquent shall be instituted by a duly verified petition filed with the clerk of the court. Section 5 provides for the contents

of the petition. It must charge the delinquency of the child and, in addition thereto, that the parents, custodian or guardian of the child "are unfit or improper guardians, or are unwilling or unable to care for, protect, train, educate, control or discipline such child or that the parent, parents, guardian or custodian consent that such child be taken from them. The petitioner shall set forth either the name or that the name is unknown to the petitioner (a) of the person having the custody of such child; and (b) of each of the parents, or the surviving parent of a legitimate child, or of the mother of an illegitimate child, or (c) if it allege that both of said parents, or such mother is dead, then of the guardian, if any, of such child; (d) if it alleges that both parents are, or that such mother is dead, and that no such guardian of such child is known to petitioner, then of a near relative, or that none such is known to petitioner. The petition shall also state the residence of such parties, as far as the same are known to such petitioner. All persons named in such petition shall be made defendants by name and shall be notified of such proceedings in the same manner as is or may hereafter be required in civil proceedings by the laws of this state."

The petition filed in the district court recited that Mamie Satterthwaite was then in the care, custody and charge of her parents, residents of Silver Bow county. The name and residence address of the mother were given, but the mother was not made a party defendant as the statute requires. The petition is insufficient, in that it fails to charge that the parents of the child are unfit or improper guardians of the child, or unwilling or unable to care for, protect, train, educate, control or discipline the child. Neither does the petition recite that the parents consented that the child might be taken from them. These proceedings are purely statutory, and substantial compliance with the terms of the statute is essential to the validity of the proceedings. In the present instance there was such failure to follow the plain mandate of the law as amounted substantially to a disregard of it.

2. *The Citation.* Section 5 of the Act provides that upon filing the petition a citation shall issue to the child's custodian to [2] show cause, and to all persons made defendants to appear and answer the petition on the return day. The record of the trial court discloses that notwithstanding the name and place of residence of this child's mother were known on April 12, the citation was not served upon her until April 29. The record further recites that the hearing or trial of the charges against the child was had on April 12, or sixteen days before the mother was notified.

In requiring service of the citation before the hearing is had, the statute has a real purpose in view even aside from any consideration of the question of due process of law:

The parent within the jurisdiction of the court whose residence is known must be made a party to the proceedings. Upon this the statute does not admit of discussion. The mother of this child was not made a party and never had her day in court. If the statute had been complied with in this respect, then the mother would have been entitled to the notice provided by the Act before the hearing or trial was had.

(a) She was entitled to a reasonable time to prepare her defense, if any she had.

(b) If the court found the case to be a proper one, the child might be returned to her mother, for the declared purpose of the Act is "that no child should be taken away or kept out of his home or away from his parents or guardian any longer than is reasonably necessary to preserve the welfare of the child and the interest of this state" (sec. 14, p. 332); and the mother had the right to an opportunity to show, if she could, that this was such a proper case for the return of her child to her as is contemplated by the statute.

(c) The parents of an alleged delinquent "may be compelled to perform their moral and legal duty in the interest of the child" (sec. 24, p. 337); but a judgment of this character could not operate upon a parent who was not given a chance to be heard.

Other reasons might suggest themselves, but in any event in the wisdom of the legislature it was deemed indispensable that the notice be given, and for the failure to give it in this instance no excuse is suggested.

3. *The Trial.* Either the accused child or its parent "shall [3] have the right to demand a trial by jury which shall be granted as in other cases unless waived" (sec. 3, p. 321). The right to a jury trial is secured. It can be waived only in manner provided by law. (*Chessman v. Hale*, 31 Mont. 577, 3 Ann. Cas. 1038, 68 L. R. A. 410, 79 Pac. 254.) The mother of this child was not even accorded the opportunity to exercise or waive the right which the statute confers, and the record fails to disclose whether a jury trial was had; whether the child waived her right, or whether she was apprised of it.

4. *The Judgment.* Before a delinquent child can be taken [4] from its parents and given over to the custody and control of the state, the court must first adjudicate that the parents of such child "are unfit or improper guardians, or are unable or unwilling to care for, protect, educate or discipline such child, and shall further find that it is for the best interest of such child and for the people of this state that such child be taken from the custody of its parents" (sec. 14, p. 328). The record in this instance omits altogether any reference to this statutory requirement. Indeed, it appears that a formal judgment was not entered at all.

In considering a very similar statute the supreme court of Utah said: "But when a complaint is filed and one or more of the acts constituting delinquency are set forth, the court only acquires jurisdiction of the child for the purpose of investigating into its condition or conduct. Quite true, in some states, a formal complaint in writing may not be an essential, but it is made so in this state, and hence must be observed. But when the court has investigated the matters set forth in the complaint and finds some or all of the charges to be true, it does not follow, from that fact alone, that the state should forthwith be substituted in place of the parent or legal guardian and take full

control of the person of the child. All that the court has established so far is that the child is a delinquent in view of the provisions of the Act. The question as to whether the parent has been derelict in respect to his duty, or whether he is a competent person or not to have charge of the child, and whether he has forfeited his natural and legal right to continue the relation, has not been touched upon, and no finding or adjudication of that fact has been made. There is nothing, therefore, up to this point, in the proceedings upon which a judgment can be based substituting the state as guardian of the person of the child in place of the parent. The whole fabric of the law, as is clearly shown by all the decisions cited *supra*, rests upon this theory, and those laws are sustained by virtue of it. Until something is made to appear that the child is not cared and provided for in respect to the matters involved, there exists no reason for the state to take charge of the person of the child, and hence no right exists to do so under the Act. \* \* \* We are constrained to hold, therefore, that before a child can be made a ward of the state, at least two things must be found: (1) That the child is a delinquent within the provisions of Chapter 117; and (2) that the parent or legal guardian is incompetent or has neglected and failed to care and provide for the child the training and education contemplated and required by both law and morals." (*Mill v. Brown*, 31 Utah, 473, 120 Am. St. Rep. 935, 88 Pac. 609.)

For the reasons indicated, the proceedings had in the district court of Silver Bow county were invalid, and the commitment affords no justification for the retention of the child.

It is ordered that Mamie Satterthwaite be released forthwith from her detention at the House of the Good Shepherd at Helena.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. WOLFE, RELATOR, v. DISTRICT COURT  
ET AL., RESPONDENTS.

(No. 3,936.)

(Submitted October 4, 1916. Decided October 5, 1916.)

[160 Pac. 346.]

*Mandamus — Criminal Law — Witnesses — Subpoenas—County  
Attorney—Power to Issue.*

1. Since subdivision 3 of section 9486, Revised Codes, lodges the power in the county attorney to issue subpoenas for the attendance of witnesses in criminal cases, and the writ does not lie where another adequate remedy exists, *mandamus* will not issue at his instance to compel a district judge to make an order authorizing the clerk of the court to do what relator himself may do.

[As to the duties the performance of which may be compelled by *mandamus*, see note in 125 Am. St. Rep. 492.]

Original application by the State at the relation of H. L. Wolfe, Jr., as county attorney of Phillips County, Montana, for writ of mandate directed to the District Court of said county, and Honorable Frank N. Utter, judge thereof. Proceedings dismissed.

*Messrs. Norris & Hurd*, for Relator.

*Messrs. Slattery & Kline*, for Respondents.

MR. JUSTICE SANNER delivered the opinion of the court.

On the twenty-third day of September, 1916, there was pending and set down to be tried on October 12, 1916, in the district court of Phillips county, the case of the *State of Montana v. Walter A. James*. James stands charged with the crime of murder, and the relator herein, as county attorney of Phillips county, applied to the court for an order authorizing the clerk to issue subpoenas for the attendance of certain witnesses in excess of six, deemed by the county attorney to be necessary for the proper prosecution of the cause. The respondent judge allowed the application in part and denied it in part; where-



upon the relator petitioned this court for a peremptory writ commanding said judge to make the order desired.

It is needless to inquire into the reasons for the refusal, because the relator is not entitled to the relief sought. Section 9486, Revised Codes, provides: "The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by \* \* \*

3. The county attorney, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried. 4. The clerk of the court in which an indictment or information is to be tried"; etc. It is perfectly obvious that this statute reposes in the county attorney a power which is subject to no restraint, save his own responsibility under the sanction of his official oath, and subpoenas issued by him pursuant to this statute are *in pari materia* with those issued by the clerk. The witnesses whose attendance is thus required have the *status* of other witnesses; they may be called, and the right of the state to have them testify is to be determined by the rules that apply to other witnesses; they are subject to contempt for not appearing, and their absence has the same effect in an application for continuance as though they had been subpoenaed by the clerk.

*Mandamus* does not lie where other adequate remedy exists, and since the respondent's refusal may be corrected by appropriate action on the part of the relator himself, the writ here sought must be denied and the proceedings dismissed. It is so ordered.

MR. JUSTICE HOLLOWAY CONCURS.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

## IN RE PALM.

(No. 3,923.)

(Submitted September 18, 1916. Decided October 7, 1916.)

[160 Pac. 348.]

*Criminal Law—Defective Information—Dismissal—Filing New Information—Habeas Corpus.*

1. Where an information was dismissed on the motion of the county attorney because of the omission of a material allegation therefrom, and a new information ordered filed by the court, the absence of a statement from the minutes of the court that before making the order it entertained the opinion that the objection to the original information could be avoided in the new one,—an entry which might properly have been made but was not required to be made by section 9204, Revised Codes,—was not sufficient ground for the release of the complainant from custody on *habeas corpus*.

[As to when plea of *autrefois acquit* is sustainable, see notes in 17 Am. Dec. 791; 58 Am. Dec. 536.]

Application by Jack Palm for writ of *habeas corpus*. Proceeding dismissed.

*Messrs. McCormick & Russell*, for Complainant.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for the State.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Jack Palm was charged by information with the commission of a felony. He demurred to the information, but before the court passed upon his objections the county attorney moved to dismiss and for leave to file a new information. The court's [1] minutes recite the procedure had as follows: "Pending the ruling on demurrer to information, on motion of county attorney and by consent of the court, the information originally filed is ordered dismissed and a new information is ordered filed. The court then stated that he sustained the demurrer to the first information." The new information was filed and the accused

applied to this court for his release from custody on *habeas corpus*.

The applicant contends that he is entitled to his release because of irregularities in the procedure in the court below. Sections 9203 and 9204, Revised Codes, provide:

"9203. Upon considering the demurrer, the court must give judgment, either allowing or disallowing it, and an order to that effect must be entered upon the minutes.

"9204. If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, or another or an amended information, directs the case to be submitted to another grand jury, or directs another or an amended information to be filed."

The irregularities of which complaint is made are more apparent than real. The application of the county attorney for leave to dismiss the original information amounted to nothing more than a confession of the demurrer, and the order granting the motion and the order sustaining the demurrer in legal effect amounted to a judgment of the court that the original information was insufficient. That document out of the way, then, the question whether a new or amended information should be filed was addressed to the court. It could be filed only upon the order of the court, and such order could be made only in the event that the court first determined that the objection to the original information could be avoided in the new one. (Sec. 9204, above.) It is true, as petitioner contends, that the record does not disclose, as it might well have done, that the court entertained such opinion; but the statute does not require that the opinion itself shall be spread upon the record or that the record shall recite that the court had first formed such opinion. The record does disclose that the court ordered the new information to be filed.

The provision of section 9204 is intended to safeguard the rights of the accused against an altogether unwarranted prosecution or the possible malice of the prosecuting officer (*State v. Vinn*, 50 Mont. 27, 144 Pac. 773), but it is not intended to shield an offender against prosecution merely because of some technical defect, irregularity or insufficiency in the original information or indictment.

The burden of determining whether further proceedings shall be taken is placed upon the court. It cannot be shifted to the county attorney who may be biased or prejudiced (*State v. Crook*, 16 Utah, 212, 51 Pac. 1091); but when the court orders the new information to be filed, the order itself presupposes the existence in the mind of the court of that opinion upon which alone the order can be made.

The record, though informal, discloses that the rights of the accused were secured and that the requirements of the statute were observed. (*People v. O'Leary*, 77 Cal. 34, 18 Pac. 856.) The accused will not be heard to say that he ought to escape even a trial, merely because the county attorney omitted from the original information a material allegation, which he could properly include in a new one.

The proceeding is dismissed and the petitioner is remanded to the custody of the sheriff of Missoula county, to await further action by the court below.

*Dismissed.*

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

## IN RE HILL.

(No. 3,924.)

(Submitted September 18, 1916. Decided October 7, 1916.)

[160 Pac. 349.]

(For syllabus, see *In re Palm*, ante, p. 558.)

Application of Aaron Hill for writ of *habeas corpus*. Proceeding dismissed.

*Messrs. McCormick & Russell*, for Complainant.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for the State.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts in this case are identical with those involved in the application of Jack Palm, just determined. Upon the authority of that decision this proceeding is dismissed and the petitioner is remanded to the custody of the sheriff of Missoula county, to be dealt with according to law.

*Dismissed.*

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. DANAHER, APPELLANT, v. MILLER, REGISTER  
OF STATE LANDS, ET AL., RESPONDENTS.

(No. 3,879.)

(Submitted September 18, 1916. Decided October 9, 1916.)

[160 Pac. 513.]

*Mandamus—State Lands—Control and Disposition—Statutes—  
Purchaser's Bond—Certificate of Purchase—Fraud—Principal  
and Agent—Ratification.*

State Lands—Control and Disposition of—Statutes Applicable.

1. *Held*, that Chapter 147, Laws of 1909, supersedes all prior and existing statutes having to do with the control and disposition of state lands.

Same—Purchaser's Bond—Not Required.

2. A purchaser of state lands is not required to give bond to secure deferred payments of the purchase price.

Same—Certificate of Purchase—Duty of Governor—*Mandamus*.

3. *Mandamus* lies to compel the governor, as president of the state board of land commissioners, to sign a certificate of purchase of state lands, his duty in this respect being a purely ministerial one.

[As to whether *mandamus* lies against governors, see notes in 33 Am. Dec. 361; 31 Am. St. Rep. 294.]

Same—Sale—Fraud—*Mandamus*—Jurisdiction.

4. The formal approval by the state board of land commissioners of a sale of state lands did not conclude the district court from investigating, in a proceeding to compel by *mandamus* the issuance of a certificate of purchase, the question of fraud claimed to have entered into the sale.

Same—Fraud—*Mandamus*—Discretion.

5. *Mandamus* is not a writ of right, but issues only in the discretion of the court; hence where it is made to appear that with reference to the very question at issue the conduct of the party asking for the writ has been tainted with fraud or such as to render the granting of it inequitable, the relief may be refused.

Same—Fraud—Principal and Agent—Ratification.

6. Under the rule that ratification of an unauthorized act has the effect of a prior authorization, *held* that a purchaser of state lands who, instead of repudiating her husband's conduct in stifling competition at the sale, with knowledge thereof, endeavored to compel transfer of the land to her, ratified his act and became bound by it.

Same—Fraud as to Part of Transaction—Effect.

7. Where two parcels of state lands were sold to the same person at the same sale, but separately as required by law, and fraud entered into the sale of one only, the buyer was entitled to a certificate of purchase for the tract free from the taint of wrongdoing, and was properly denied relief as to the other.

*Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.*

PROCEEDING in *mandamus* by the State on the relation of Mary M. Danaher against Sidney Miller, as register of state lands, and S. V. Stewart, as president of the State Board of Land Commissioners. Judgment for defendants. Relatrix appeals from the judgment and an order denying a new trial. Remanded with directions.

*Messrs. Wight & Pew*, for Appellant, submitted a brief, *Mr. Chas. E. Pew* argued the cause orally.

Respondents argue that the governor cannot be *mandamus*ed even to perform a ministerial duty. That this argument is unsound has been settled in this state ever since the decision in the case of *Chumasero v. Potts*, 2 Mont. 242. (*State v. Rickards*, 16 Mont. 145, 50 Am. St. Rep. 476, 28 L. R. A. 298, 40 Pac. 210; *State v. Smith*, 23 Mont. 44, 57 Pac. 449.) See, also, *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284, 15 L. R. A. 369, 28 Pac. 1125, a case on all-fours with the one at bar.

When the board has acted, its orders are final. Upon all questions of fact its findings are final, and not open to question in any other forum. In this respect the powers of the board are analagous to those of the Department of the Interior; and the rule is firmly settled that the findings of that department are final and conclusive upon all questions of fact. (*Small v. Rakestraw*, 28 Mont. 413, 104 Am. St. Rep. 691, 72 Pac. 746; *Love v. Flahive*, 33 Mont. 348, 83 Pac. 882.) True, the rule is stated with the qualification "in the absence of fraud." That exception applies only to fraud practiced upon the department, and not to alleged fraud which was the subject of inquiry before the department. (*Shepley v. Cowan*, 91 U. S. 340, 23 L. Ed. 424.)

Fraud is a question of fact; and in the absence of a contrary showing the presumption is that every matter affecting the sale was before and passed upon by the board, including the facts upon which the alleged fraud is predicated. The sale being ap-

proved, it is presumed that the board decided that no fraud was shown.

Neither the governor nor the register could go back of the records of the land board, which show a regular sale and a regular approval by the board, leaving nothing to be done but to prepare, sign and deliver the certificate authorized and directed to be prepared and signed by those officers, as ministers of the state land department, as evidence of the fact that a sale had been made, the terms upon which it had been made, and the person to whom the land had been struck off. (*Stearns v. State*, 23 Okl. 462, 100 Pac. 909.)

The rights of appellant cannot be affected by the alleged fraud of strangers.

That such an arrangement as that between Thomas Danaher and I. Y. Wood is not fraudulent, especially in the case of a sale such as the one under consideration, is illustrated by the decision in the case of *Piatt v. Oliver*, 1 McLean, 295, Fed. Cas. No. 11,114; s. c., 3 How. (U. S.) 411, 11 L. Ed. 658. In the case at bar, the most that could possibly be said to have been shown at the hearing, as to any combination, was that I. Y. Wood and Thomas Danaher formed a limited partnership for the special purpose of buying the southwest quarter of section 16; but even as to this, no testimony whatever has been introduced connecting Mrs. Danaher with the transaction.

*Mr. Wellington D. Rankin*, for Respondents, submitted a brief and argued the cause orally.

The petition does not aver sufficient facts to entitle appellant to any relief because the governor's acts in signing the certificate are discretionary, and therefore not subject to control by *mandamus*. In *State v. Smith*, 23 Mont. 44, 49, 57 Pac. 449, the court held that the performance of a discretionary duty of the governor could not be compelled by the courts. (See, also, *United States v. Windom*, 137 U. S. 636, 34 L. Ed. 811, 11 Sup. Ct. Rep. 197; *State ex rel. Gravely v. Stewart*, 48 Mont. 347, 137 Pac. 854; *Mechem on Public Officers*, sec. 954.) If the act



of the governor in signing a certificate of purchase is one involving a discretion, it does not become material what reasons are assigned, or whether any reasons exist for not doing so.

Any agreement the purpose of which is to prevent fair competition in bidding at a public sale of state lands is contrary to public policy and vitiates the sale. (*Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134.) An agreement not to bid for the purpose of paralyzing competition is a fraud upon the vendor and vitiates the sale. (*Lloyd v. Malone*, 23 Ill. 43, 74 Am. Dec. 179; *Smith v. Greenlee*, 2 Dev. L. (N. C.) 126, 18 Am. Dec. 564; *Farr v. Sims*, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 398; *Kearney v. Taylor*, 15 How. (U. S.) 494, 14 L. Ed. 798; *James v. Fulcord*, 5 Tex. 512, 55 Am. Dec. 743; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248.)

The courts will not compel the performance of a useless or an illegal act. A sale at which competition was prevented was not a public sale within the meaning of this provision. For this reason the sale would be void. (*Kearney v. Taylor*, *supra*.) The sale being void *ab initio*, a certificate, if issued and signed, would be a mere nullity. The writ should never be granted to compel an illegal act or to aid a relator who is not entitled to relief. (*Sherwood v. Rynearson*, 141 Mich. 92, 104 N. W. 392; High on Extraordinary Legal Remedies, sec. 40; *State ex rel. Waitt v. Hill*, 32 Minn. 275, 20 N. W. 196; 13 Ency. Pl. & Pr. 496; 19 Am. & Eng. Ency. of Law, 2d ed., 725-730.) Where it is apparent to the court to which an application for *mandamus* is made that the relator has been at fault, it is within the discretion of the court to deny the application. (13 Ency. Pl. & Pr. 499; *Sherwood v. Rynearson*, *supra*.) Or where the conduct of the relator has been such as to render it inequitable to grant the relief sought, the court may, in the exercise of its discretion, refuse the writ. (*People v. Jeroloman*, 139 N. Y. 14, 34 N. E. 726.)

Mr. Danaher, in stifling the bidding, was acting as the duly authorized agent of his wife, the relatrix. (*Bankard v. Shaw*, 199 Pa. St. 623, 49 Atl. 230; *Puget Sound Lumber Co. v. Krug*,

89 Cal. 237, 26 Pac. 902; 21 Cyc. 1419.) The relatrix ratified the fraudulent acts of her husband and wishes to profit by the same. This is manifested by her conduct in bringing this action. (1 Mechem on Agency, sec. 477; *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1027; *Warder, Bushnell, Glessner Co. v. Cuthbert*, 99 Iowa, 681, 68 N. W. 917; *American Express Co. v. Lankford*, 2 Ind. Ter. 18, 46 S. W. 183.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At a sale of state lands held in Helena, the west half of section 16, township 14 north, range 9 west, was offered for sale in two separate parcels of 160 acres each. Mary M. Danaher was the only bidder for either parcel and was declared to be the purchaser of each at \$10 per acre. She paid over to the register of state lands the first installment required by law, and thereafter at a regular meeting of the state board of land commissioners these sales were approved. The governor, as president of the board, and the register refused to issue a certificate of purchase to Mrs. Danaher, and this proceeding in *mandamus* was instituted.

The officers interpose as a defense that Thomas Danaher, husband and agent of Mrs. Danaher, conspired with one I. Y. Wood to prevent competitive bidding for the land; that the conspiracy was carried into effect, by reason whereof the state will be defrauded if the relief sought is granted. The trial developed these facts: Mrs. Danaher desired to purchase the entire half section. Wood desired to secure the southwest quarter and came to the sale prepared to bid as much as \$13 per acre, if necessary. Just before the sale commenced, Thomas Danaher and Wood agreed that one of them should bid in this quarter-section and that the two should then toss a coin to determine which one should get it. Immediately after the register had declared the two tracts sold to Mrs. Danaher, Thomas Danaher turned to Wood and offered him \$150 for his chance, and, the offer having been accepted, Mrs. Danaher drew her check in

favor of Wood for the amount and delivered it to him. She had knowledge of the terms of the agreement at the time she paid over the money or immediately thereafter. The trial court dismissed the proceeding, and from the judgment of dismissal and from an order denying a new trial relatrix appealed.

1. The statutes relating to the management and disposition [1] of the state lands were found in the Political Code of 1895 and the amendments thereto, until the Act of March 19, 1909 (Laws 1909, Chap. 147), became effective. This later Act appears to have been intended, not as a supplement to existing laws, but as a complete code of laws upon the subject—Control and Disposition of State Lands. It revises the whole subject matter of the earlier statutes and repeals all Acts and parts of Acts in conflict with it. In our opinion it superseded all prior and existing statutes which had to do with the same subject.

2. It is insisted that relatrix fails to state a cause of action, [2] in that she fails to allege that she gave or tendered a bond to secure the deferred payments. While sections 41, 43 and 45 of the new Act refer to the purchaser's bond, the Act itself does not anywhere require a purchaser to give bond to secure the deferred payments. The failure to make such requirement may have been the result of oversight, but even so, the courts are not authorized to supply the deficiency if one exists.

3. Section 43 provides that a purchaser shall be entitled to a [3] certificate of purchase, which certificate "shall be signed by the governor as the president of the state board of land commissioners and by the register." In signing such certificate the governor performs a mere ministerial duty, and if he fails or refuses to perform such duty when he should perform it, *mandamus* will lie to compel performance. (*Chumaseo v. Potts*, 2 Mont. 242.)

4. The trial court was not precluded from investigating the [4] question of fraud raised by the pleadings. That the formal approval of a sale by the state board was not intended to be conclusive, even upon questions of fact, is manifested by the

further provision in section 48 that the board may cancel a certificate for fraud at any time within three years from its date of issue.

It is to be borne in mind further, that *mandamus* is not a writ [5] of right. It issues only in the discretion of the court (*State ex rel. Donovan v. Barrett*, 30 Mont. 203, 81 Pac. 349; *State ex rel. Bailey v. Edwards*, 40 Mont. 313, 106 Pac. 703); and when it is made to appear that with reference to the very question at issue, the conduct of the party applying for the writ has been such as to render it inequitable to grant it, the relief may be refused. (*People ex rel. Durand L. I. Co. v. Jeroloman*, 139 N. Y. 14, 34 N. E. 726.) Courts are not created to aid in the perpetration of fraud.

5. Is relatrix bound by the acts of Thomas Danaher? Whether [6] Thomas Danaher was the duly authorized agent of his wife at the time he entered into the agreement with Wood is of no moment here. The agreement was made for the benefit of Mrs. Danaher, and, conceding that she was not bound by it at the time and that she might have repudiated it when she became aware of its terms and conditions, yet she failed to exercise such right, but, on the contrary, has ever since insisted that the courts should aid her to profit by it. She ratified her husband's act, which has the effect of a prior authorization. (Rev. Codes, sec. 5422.) The agreement was unlawful, and to permit it to be carried into effect would result in a fraud upon the state. (6 Corpus Juris, 830.) "All sales of state lands shall be at public auction" (sec. 38, Act 1909), and this means a sale to the highest and best bidder with absolute freedom for competitive bidding. Any agreement, therefore, to stifle competition or chill the bidding is a fraud upon the principle upon which the sale is founded. (4 Cyc. 1044, and cases cited.)

The transaction before us bears no resemblance to an agreement between two *bona fide* prospective bidders to combine their means for the purchase of property to be divided between them. It was intended to stifle competition in bidding and had that

effect. The relatrix has no standing in a court to insist upon a right to, or interest in, the southwest quarter.

If the purchase of the entire west half had constituted one [7] transaction, the fraud would have permeated the whole transaction; but each quarter-section was sold as a distinct entity as the law requires. There were two sales, and so far as this record discloses, the purchase of the northwest quarter was free from any taint of wrongdoing. The relatrix appears to have established her right to a certificate of purchase for that parcel, and should have been granted relief to that extent.

A new trial is unnecessary, and the order denying one will be affirmed. The cause is remanded to the district court with directions to grant the relatrix relief to the extent herein indicated.

MR. JUSTICE SANNER CONCURS.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

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KITTS, RESPONDENT, v. WOODS ET AL., APPELLANTS.

(No. 3,680.)

(Submitted September 19, 1916. Decided October 13, 1916.)

[160 Pac. 512.]

*Judgment—Assignment—Execution—Sheriffs—Wrongful Payment of Proceeds.*

1. After an abstract of judgment rendered in a justice's court had been filed in the district court, all claim to the proceeds thereof was assigned for value; the assignee caused execution to be issued and the money due thereon was collected by defendant sheriff, who refused to pay it to the assignee but turned it over to the judgment creditor in an action against the assignor brought after the assignment had been made. *Held*, that the assignee was entitled to the money.

[As to effect of assignment of judgment, see note in 78 Am. St. Rep. 47.]

*Appeal from District Court, Fergus County, in the Tenth Judicial District; John A. Matthewes, Judge of the Fourteenth District, presiding.*

ACTION by Maurice C. Kitts against W. R. Woods, Sheriff, and others. Judgment for plaintiff, and defendants appeal from an order denying them a new trial. Affirmed.

*Messrs. Belden & De Kalb*, for Appellants, submitted a brief; *Mr. O. W. Belden* argued the cause orally.

*Mr. E. K. Cheadle*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The pleadings and evidence in this case justify the following: On July 9, 1912, one Thomas J. Kitts caused to be filed and docketed in the district court of Fergus county a memorandum emanating from the justice court of Ross Fork township in said county, certifying that on July 12, 1911, he recovered a judgment in that court against one M. E. Stoner for \$159.95; this memorandum, entitled and intended as an abstract of judgment under sections 7056 and 7057, Revised Codes, was later amended to show that the judgment as recovered in the justice court was for \$145.25, with costs amounting to \$23.70—in all, \$168.95; on the nineteenth day of August, 1912, said Kitts, in consideration and partial payment of a debt due from him to Mamie C. Kitts for labor, by formal assignment transferred and set over to her "the said judgment and all sum or sums of money or other property, rights or remedies that may be had or obtained by means thereof, or of any proceedings to be had thereon, including liens"; thereafter and upon execution issued out of the district court, placed in his hands for levy, W. R. Woods, as sheriff of Fergus county, collected from Stoner the sum of \$173.91, as the accrued principal, interest and costs of said judgment; Woods refused to pay over the money so collected to Mamie Kitts, though advised of said assignment, but retained it as the money of Thos. J. Kitts because of a writ of attachment issued out of the district court on November 7, 1912, in an action brought

against Thos. J. Kitts by the Montana Lumber Company, and at the expiration of his term of office turned it over to his successor, Firmin Tullock. Tullock likewise refused to pay the money to Mamie Kitts, but held it until execution issued in the lumber company's action against Thos. J. Kitts; whereupon Tullock applied the money to said execution by paying it over to the lumber company. The lumber company retained the money notwithstanding the demands of Mamie Kitts therefor, and she brought this action against it as well as Woods and Tullock to recover the same. Trial was to a jury, whose verdict was for the plaintiff, and judgment followed accordingly. Defendants moved for a new trial, and this being denied, they appealed.

The only contention presented to us is that the plaintiff failed [1] to prove by competent evidence the existence of a valid judgment of the justice court in *Thos. J. Kitts v. Stoner*. In the present instance such proof was not necessary. The essence of plaintiff's case was that the sheriff collected and paid over to the lumber company, and it has kept, the proceeds of her claim against Stoner. This claim is identified as a claim theretofore owned by Thos. J. Kitts, reduced to a supposed or purported judgment in the justice court and assigned to her for value. Stoner chose to recognize the judgment as existing and valid by paying it, and the appellants chose to do the same thing by levying on the proceeds, treating them as the property of Thos. J. Kitts. If, therefore, this claim was assigned for value to Mamie Kitts before the levy of attachment in the lumber company's action against Thos. J. Kitts, then she, at the time the collection was made from Stoner, owned the claim and was entitled to the money. This—the only real issue in the case—was resolved by the jury in favor of Mamie Kitts, and with that conclusion no fault is, or can be, founded on this record.

The order denying a new trial is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

**POHL, APPELLANT, v. CHICAGO, MILWAUKEE & ST. P.  
RY. CO., RESPONDENT.**

(No. 3,679.)

(Submitted September 18, 1916. Decided October 16, 1916.)

[160 Pac. 515.]

***Taxation—Poll Taxes—Statutes—Constitution—Due Process of  
Law—Equal Protection of the Law—County Assessor.***

**Taxation—Direct Taxes—United States Constitution.**

1. Sections 2 and 9, Article I, United States Constitution, which declare that if direct taxes are laid, they must be apportioned among the several states according to population, are limitations upon the power of Congress and have no application to the states; they could therefore not be looked to in support of an attack upon the statute imposing a poll tax (secs. 2692-2714, Rev. Codes).

[As to what is a direct tax within the meaning of the federal Constitution, see note in Ann. Cas. 1912B, 1328.]

**Same—Poll Taxes—Constitution—Due Process of Law.**

2. The statute imposing a poll tax held not subject to the objection (sec. 1, 14th Amendment, U. S. Constitution) that in failing to provide for notice before the tax is levied and collected, it deprives the taxpayer of his property without due process of law.

**Statutes—Constitutionality—Who may not Question.**

3. One not affected by a statute will not be heard to question its constitutionality.

**Taxation—Exemption from—Constitution.**

4. Section 6, Article XII, of the state Constitution, forbidding the release of municipal corporations or their inhabitants from their proportionate share of state taxes, refers only to state taxes and not to those imposed for county or local purposes, such as poll taxes.

**Statutes—Constitutionality—Rule.**

5. In determining the constitutionality of statutes, courts look beyond the mere form of expression to the object and purpose of the legislation.

**Taxation—Poll Taxes—Nature of Imposition—Equal Protection of Laws.**

6. Held, that the statute imposing a poll tax is a police regulation designed to carry into effect the provision of section 5, Article X, of the Constitution, making it incumbent upon the counties of the state to care for their poor; that such an imposition is not a "tax" within the meaning of the Constitution and revenue measures generally, and therefore not subject to the uniformity rule or other restrictions incident to such measures.

**Same—Poll Taxes—County Assessor may Collect.**

7. The legislature could properly provide that the county assessor should act as collector of poor funds in the shape of poll taxes, and in performing that duty such officer did not become a collector of taxes, contrary to constitutional provision.



*Appeal from District Court, Powell County, in the Third Judicial District; J. E. Erickson, Judge of the Eleventh District, presiding.*

ACTION by E. C. Pohl against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Mr. W. E. Keeley, for Appellant, submitted a brief and argued the cause orally.

Sections 1068 and 2692, Revised Codes, are void as a capitation tax. A poll tax is not a tax upon property. It is a capitation tax; that is, a specific sum levied upon each person so taxed. (*Hassett v. Walls*, 9 Nev. 387; *People v. Ames*, 24 Colo. 422, 51 Pac. 426-428; *Proffit v. Anderson* (Va.), 20 S. E. 887; *Southern Ry. Co. v. St. Clair Co.*, 124 Ala. 491, 27 South. 23-25, 491; *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 434, 517.)

Sections 2701, 2702, 2704 and 2705 are special laws for the assessment and collection of taxes. (*State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516; *Daly Bank v. Board*, 33 Mont. 101, 81 Pac. 952; *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303.)

Section 2702 is void because it deprives the employee of his property without due process of the law.

It has been repeatedly held in this state, ever since the case of *Chauvin v. Valiton*, 8 Mont. 451, 3 L. R. A. 194, 20 Pac. 658, the doctrine in which case has been ever since reaffirmed by this court, that this cannot be done. "Due process of law includes a notice and hearing before judgment." (*State v. District Court*, 33 Mont. 529, 532, 85 Pac. 367; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 218, 119 Pac. 554.)

In the case of *McMillan v. The City of Butte*, 30 Mont. 220, 76 Pac. 203, it was held that creation of special improvement districts was not opposed to due process of law, because an opportunity is given the taxpayers to be heard, but reaffirmed the doctrine expressed in *Chauvin v. Valiton*. (*Ex parte Sullivan*,

10 Okl. Cr. 465, 138 Pac. 815; *Anderson v. Great Northern R. E. Co.*, 25 Ida. 433, Ann. Cas. 1916C, 191, 138 Pac. 127.)

Popular acquiescence in a particular mode of levying taxes for a long period of time cannot make it legal, where it clearly contravenes the provisions of the Constitution. (*State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914, 1 Ann. Cas. 634, 67 L. R. A. 280, 77 Pac. 961; approved in *Tekoa v. Rielly*, 47 Wash. 202, 13 L. R. A. (n. s.) 901, 91 Pac. 769.)

Poll taxes cannot be collected. Under the poll tax laws of Montana, the legislature has conferred no power upon the county treasurer to collect poll taxes. On the other hand, it attempted to confer this power upon the county assessor (secs. 2693, 2699, 2700, 2701, 2703, 2704, 2707, 2709, 2710 and 2713, Rev. Codes). But all attempts to confer any power upon the assessor to collect taxes are void. (*Mutual Life Ins. Co. v. Martien*, 27 Mont. 437, 71 Pac. 470.)

*Mr. J. B. Poindexter*, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, submitted a brief in behalf of Respondent; *Mr. Wagner* argued the cause orally.

Authority of the assessor to collect poll taxes is not involved in this case. The procedure outlined by sections 2701, 2702, 2703 and 2714, Revised Codes, was followed. The employer paid to the county directly money in his hands due to and belonging to the county. The law is constitutional. (*State v. Owsley*, 17 Mont. 94, 42 Pac. 105; 37 Cyc. 766; *Shane v. City of Hutchinson*, 88 Kan. 188, 127 Pac. 606; *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351, 12 Ann. Cas. 314, 9 L. R. A. (n. s.) 306, and note, 87 Pac. 634; *Tekoa v. Reilly*, 47 Wash. 202, 13 L. R. A. (n. s.) 901, and note, 91 Pac. 769.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment upholding the statute imposing our so-called poll tax. (Rev. Codes, secs. 2692-2714.) The statute was enacted in 1891 (Laws 1891,

p. 73), amended slightly in 1893 (Laws 1893, p. 65), and, as thus modified, carried into the compilations of 1895 and 1907. It is assailed upon the ground that it conflicts with the provisions of sections 2 and 9, Article I, of the Constitution of the United States, which declare that direct taxes, if laid, shall be apportioned among the several states according to population, and with section 1 of the Fourteenth Amendment, which forbids any state to deprive a person of life, liberty or property without due process of law.

The first two sections have no application to the states. They [1] are merely limitations upon the power of Congress. (Cooley on Taxation, 2d ed., p. 8; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673.)

Assuming for present purposes that the statute under review [2] provides for the imposition of a tax as that term is understood in revenue parlance, it is not subject to the objection that in failing to provide for notice before the tax is levied or collected, it deprives the taxpayer of his property without due process of law. This question was set at rest by the supreme court of the United States in *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, where it is said: "Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded."

In his brief, counsel for appellant suggests that the statute is repugnant to the provisions of section 2, Article III, of our state Constitution; but in the absence of something more specific, we are utterly unable to appreciate the force of the suggestion or to discover the remotest relationship between those provisions and the subject matter under consideration.

The statute does not apply to paupers, insane persons, Indians [3] not taxed, or to persons under twenty-one or over sixty years of age. Another statute (sec. 1068, Rev. Codes) specifically exempts members of the organized militia. Because of this lack of uniformity it is urged that these statutes conflict with section 6, Article XII, which provides: "No county, city, town or other municipal corporation, the inhabitants thereof nor the property therein, shall be released or discharged from their or its proportionate share of state taxes." In the first place, appellant cannot raise the question of the authority of the state to exempt members of the organized militia from the payment of this so-called tax. Appellant is not a member of the national guard and is not affected by the exemption. His contribution is not increased in amount by reason of the exemption, and would not be diminished in amount if every member of the organized militia contributed. The validity of section 1068 is not in issue, here, for it is an elementary rule that one who is not affected by a statute will not be heard to question it. (*State ex rel. Holliday v. O'Leary*, 43 Mont. 157, 115 Pac. 204.)

Section 6, Article XII, refers only to state taxes levied for [4] the support of the state government, and not to taxes imposed for county or local purposes. No part of this so-called poll tax is devoted to maintaining the state, within the meaning of section 6 above.

The statute (secs. 2692-2714) is not open to the objections urged against it for the stronger reason. While in terms it designates the imposition a "poll tax," the name itself is of no significance. A different designation might have been more [5, 6] appropriate; but in any event, courts look beyond the

mere form of expression to the object and purpose of the legislation. This so-called tax is imposed for and applied to a single purpose—the care of the county poor. (Sec. 2714.) It will scarcely be questioned that the state, in the exercise of its police power, can care for its poor, sick and infirm who are public charges, or delegate the power to do so to the several counties, its political subdivisions. Enlightened civilization imposes this duty upon every community, but in this state the duty is made imperative by the Constitution itself. Section 5, Article X: “The several counties of the state shall provide as may be prescribed by law for those inhabitants who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society.”

The statute now under consideration is nothing more nor less than a police regulation designed to carry into effect the will of the people expressed in the constitutional provision quoted above. It is analogous to a so-called road poll tax exacted for the maintenance of the public highways, and the authorities are practically unanimous in holding that such an exaction is not a tax as the term is used in the Constitution and in revenue measures generally. It is not subject to the uniformity rule or to other restrictions which hedge about measures relating to taxation. (*Salt Lake City v. Wilson* (Utah), 148 Pac. 1104; *State v. Rayburn*, 2 Okl. Cr. 413, 101 Pac. 1029, Ann. Cas. 1912A, 733, and note, 22 L. R. A. (n. s.) 1067; see, also, *Tekoa v. Reilly*, 47 Wash. 202, 13 L. R. A. (n. s.) 901, 91 Pac. 769; *Short v. State*, 80 Md. 392, 29 L. R. A. 404, 31 Atl. 322; *Elting v. Hickman*, 172 Mo. 237, 72 S. W. 700; *Fairbault v. Misener*, 20 Minn. 396; *Shane v. City of Hutchinson*, 88 Kan. 188, 127 Pac. 606.)

It is competent for the legislature to provide for securing [7] these poor funds through the instrumentalities designated in the statute, and the assessor, in performing his allotted duty in this behalf, is not a collector of taxes, and the decision of this court in *Mutual Life Ins. Co. v. Martien*, 27 Mont. 437,

71 Pac. 470, has no application to the state of facts exhibited by this record.

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

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McBAIN, RESPONDENT, v. NORTHERN PACIFIC RY. CO.,  
APPELLANT.

(No. 3,688.)

(Submitted September 20, 1916. Decided October 18, 1916.)

[160 Pac. 654.]

*Personal Injuries—Railways—Federal Employers' Liability Act  
—Interstate Commerce.*

*Personal Injuries—Railways—Interstate Commerce—What Constitutes.*

1. The test to be applied for determining whether a trainman was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, when he was injured, is the nature of the work done by him at the time of the accident, and not the character of that performed immediately theretofore or that intended to be engaged in right after completion of his then present task.

[As to Federal Employers' Liability Act as superseding common and statutory law on the same subject, see note in *Ann. Cas.* 1915B, 493.]

*Same—Interstate Commerce—What Does not Constitute.*

2. The fact that the work performed by a trainman at the time he was injured had to do with interstate commerce to a much greater extent than with purely local shipments, *held* of no consequence in determining whether he then was engaged in interstate commerce.

*Same—Interstate Commerce—Case at Bar.*

3. A brakeman on a train the crew of which was engaged in handling both interstate and intrastate freight, having completed his run some hours before, and while on his way to the yard office for supplies needed on his caboose whenever it should be called into service, boarded a locomotive going in the direction of the office and was injured. He had not been called for duty; his train had not been made up, and his caboose was standing on a siding awaiting assignment. *Held*, that plaintiff was not at the time of his injury employed in interstate commerce.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by J. H. McBain against the Northern Pacific Railway Company. Judgment for plaintiff. Defendant appeals from it and an order denying its motion for a new trial. Reversed and remanded, with directions to enter judgment for defendant.

*Messrs. Gunn, Rasch & Hall* and *Messrs. Walker & Walker*, for Appellant, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

The plaintiff was not engaged or engaging in interstate commerce at the time he was hurt. The question whether or not the Federal Employers' Liability Act applies is determined by the particular service in which the employee was engaged at the time of the injury. It must be, as was said by the supreme court of the United States in the case of *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, Ann. Cas. 1914C, 163, 58 L. Ed. 1051, 34 Sup. Ct. Rep. 646, "a service in interstate commerce," or, as stated by the supreme court of Kansas in *Barker v. Kansas City, M. & O. Ry. Co.*, 94 Kan. 176, 146 Pac. 358, the work which the plaintiff is doing at the time of the injury must have "a real and substantial connection with interstate commerce." (*Pennsylvania R. Co. v. Knox*, 218 Fed. 748, 134 C. C. A. 426; *Barker v. Kansas City, M. & O. Ry. Co.*, 94 Kan. 176, 146 Pac. 358; *Atchison, T. & S. F. Ry. Co. v. Pitts*, 44 Okl. 604, 145 Pac. 1148; *Illinois Central R. Co. v. Rodgers*, 221 Fed. 52, 136 C. C. A. 530.)

*Mr. Ed Fitzpatrick* and *Mr. G. L. Tyler*, for Respondent, submitted a brief; *Mr. Tyler* argued the cause orally.

It is contended by the appellant that plaintiff was not engaged or engaging in interstate commerce at the time he was injured, and the rule laid down in *Barker v. Kansas City M. & O. Ry. Co.*, 94 Kan. 176, 146 Pac. 358, is cited as bearing on the case, and it is contended that the work which the plaintiff is doing at the time of the injury must have "a real and substantial connection with interstate commerce." It is contended by respondent that when he was procuring supplies that were to be used and were used on his regular run, which said run usually carried inter-

state commerce, as it was on the main line and carried through freight from one division point, Ellensburg, to another division point, Pascoe, he was performing a necessary duty, which had a very substantial connection with interstate commerce, and that supplies such as were being obtained by plaintiff were necessary and indispensable to the safe and efficient transportation of interstate commerce. (See *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648; also, *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 51, 38 L. R. A. (n. s.) 44, 56 L. Ed. 327, 32 Sup. Ct. Rep. 169; *Cousins v. Illinois Central R. Co.*, 126 Minn. 172, 148 N. W. 58; *Johnson v. Great Northern R. Co.*, 178 Fed. 643, 102 C. C. A. 89; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250; *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99; *Thornbro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, Ann. Cas. 1915D, 314, 139 Pac. 410; *Oberlin v. Oregon, Washington Ry. & Nav. Co.*, 71 Or. 177, 142 Pac. 554; *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 South. 693; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305; *Missouri, K. & T. R. Co. v. Rents* (Tex. Civ. App.), 162 S. W. 959.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff recovered a judgment in the district court of Silver Bow county, and the defendant appealed therefrom and from an order denying it a new trial.

The facts disclosed by the record and pertinent here are that on October 15, 1912, plaintiff was employed by the defendant as a brakeman on the Pascoe division of the road in the state of Washington and was at the city of Ellensburg, Washington. The train-crew of which he was a member engaged indiscriminately in handling interstate and intrastate shipments of freight. At the time of his injury plaintiff was going from his caboose to the yard office to present a requisition for



supplies needed upon the caboose whenever it should be called into service. He started to make the trip on foot, but, a train from the west passing by, he boarded the locomotive and while riding on it was injured. He had completed his previous run some hours before, and anticipated that he would be again called into service soon after noon on the 15th, but whether to handle interstate or purely local freight he had no means of knowing, as he had not been called for duty; his train had not been made up and his caboose was on a siding in the yard awaiting assignment.

The action was brought under the Federal Employers' Liability Act (35 Stats. at Large, 65), and plaintiff assumed the burden of pleading and proving that at the time he was injured he was engaged in interstate commerce. The allegation of his complaint is sufficient, but does his proof sustain it? The record presents a federal question, and the decisions of the United States supreme court upon it are conclusive upon this court. Under a state of facts substantially identical with the facts before us, that court held that it is immaterial that the injured party may have been engaged in interstate commerce immediately before he was injured, or that immediately after completing his then present task he would again engage in interstate commerce, and said: "The true test is the nature of the work being done at the time of the injury." (*Illinois Cent. R. R. Co. v. Behrens*, 233 U. S. 473, Ann. Cas. 1914C, 163, 58 L. Ed. 1051, 34 Sup. Ct. Rep. 646.) Applying that test to the facts presented here, and it is apparent at once that plaintiff has failed to make out his case under the federal statute. The character of the supplies he sought furnishes no index to his employment. The fuses, torpedoes and waste were necessary supplies for his caboose, whether it would be employed in interstate or intrastate commerce, and at the time of his injury it was impossible to determine the character of his next assignment, for he had not then been called to duty; the train to which

his caboose would be attached had not then been made up, and the caboose had not been assigned.

Under the interpretation placed upon this statute by the supreme court of the United States, it is of no consequence that the work performed by plaintiff had to do with interstate commerce to a much greater extent than with purely local shipments. The Congress doubtless had authority, under the commerce clause of the Constitution, to impose upon a carrier engaged in both interstate and intrastate traffic, liability for an injury sustained by its employee in the course of its general work, "whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce" (*Behren's Case*, above); but Congress did not see fit to exercise its authority to that extent. The Act in question provides: "That every common carrier by railroad while engaging in commerce between any of the several states • • • shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," etc. In further consideration of this feature of the statute the court in the case above said: "Giving to the words, 'suffering injury while he is employed by such carrier in such commerce'; their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce." At the time he was injured, plaintiff was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act as construed by the highest court of the land. (*Alexander v. Great N. Ry. Co.*, 51 Mont. 565, 154 Pac. 914.) Whether he could have succeeded under the statutes of Washington, even though he failed to make out his case under the federal Act, does not appear. The statutes of Washington are not pleaded or relied upon. Plaintiff chose to sue in the courts of this state instead of the courts of the state where his injury occurred, and we cannot take judicial notice of the statute law of a sister state.

For the reason given, the judgment and order are reversed and the cause is remanded to the district court, with directions to enter judgment for the defendant.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

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STATE, RESPONDENT, v. RUSSELL, APPELLANT.

(No. 3,692.)

(Submitted September 20, 1916. Decided October 23, 1916.)

[160 Pac. 655.]

*Criminal Law—Fish and Game—Evidence—Sufficiency—Harmless Error.*

*Criminal Law—Hearsay Evidence—Harmless Error.*

1. Evidence wholly immaterial and which could not possibly have prejudiced defendant, was not alone sufficient to work a reversal of the judgment of guilty of a misdemeanor, though erroneously admitted under the hearsay rule.

*Same—Violation of Fish and Game Law—Evidence—Sufficiency.*

2. Evidence held sufficient to warrant the conviction of defendant charged with taking fish from a stream unlawfully.

[As to power of states to regulate taking of fish in tide-waters, see note in 23 Am. St. Rep. 837.]

*Appeal from District Court, Ravalli County; B. Lee McCulloch, Judge.*

JOHN A. RUSSELL, convicted of a misdemeanor, appeals from the judgment and an order denying him a new trial. Affirmed.

Cause submitted on briefs of counsel.

Mr. Harry H. Parsons, for Appellant.

Mr. J. B. Poindexter, Attorney General, and Mr. C. S. Wagner, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This appellant was convicted of a misdemeanor in a justice of the peace court. He appealed to the district court, where he was again found guilty, and now appeals from the judgment and from an order denying him a new trial.

1. An attack is made upon the complaint, but we think it is sufficient to charge the unlawful taking of fish from a stream of this state, as that offense is defined by section 2, Chapter 79, Laws of 1913. It appears also to meet the requirements of section 9032, Revised Codes.

2. Complaint is made that the trial court admitted certain [1] hearsay evidence. In explanation of his act in making a report to a deputy game warden, a witness for the state testified that he was prompted to do so because "the Wagner boys told me that someone down the river was killing fish." This explanatory evidence was hearsay, but it was brought out by a preliminary question, was wholly immaterial, and it is inconceivable that any substantial right of the defendant was prejudiced by it. Under these circumstances the judgment cannot be reversed on that ground alone. (Rev. Codes, secs. 9415, 9548; *State v. Crean*, 43 Mont. 47, Ann. Cas. 1912C, 424, 114 Pac. 603.)

3. The other specifications of error call in question the [2] sufficiency of the evidence in view of the court's instruction No. 3. That instruction imposed upon the prosecution a greater burden than the circumstances of the case warranted; but even so, the only fair deduction from the evidence produced by the state is that appellant deposited in the Bitter Root River, in Ravalli county, fishberries ground up with meat, which were eaten by the fish, with the result that they were stupefied and rendered easy prey; that while in that condition appellant, by means of a landing-net, took from the river at least one of these fish. If the jury had believed the evidence offered by the defense, a different verdict would have been required; but the

jurors were the judges of the credibility of the witnesses and of the weight to be given to their testimony. The only conclusion from the verdict is that no credence whatever was given to the story told by appellant and his companions. There is evidence in the record to justify the verdict, and we shall not interfere.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

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HUFFINE, RESPONDENT, v. LINCOLN ET AL., APPELLANTS.

(No. 3,684.)

(Submitted September 19, 1916. Decided October 28, 1916.)

[160 Pac. 000.]

*Trusts Ex Maleficio—Husband and Wife—Wills—Dower—Real Property—Secret Trust—Notice—Parties—Implied Findings.*

*Trusts ex Maleficio—Husband and Wife—Real Property Conveyance—Breach of Condition.*

1. Where a wife's intention to convey property owned by her in her own right to an only daughter, was, through the influence of the husband, made possible by reason of the confidential relations between them, so changed as to cause her to convey to him instead, upon his promise to make a will devising such property as well as his own to the daughter and a son in equal shares, which promise was after the wife's death broken and the will, theretofore made, destroyed, the husband was rightfully declared an involuntary trustee of the property, in favor of the daughter, the intended beneficiary.

*Same—Proper Party Plaintiff.*

2. The daughter who, but for the conduct of her father, would have become the owner of her mother's property, was, under Section 5373, Revised Codes, the real party in interest and, therefore, entitled to maintain suit to have the father declared an involuntary trustee in her favor.

*Husband and Wife—Dower—Trust Property.*

3. Generally speaking, a wife has no dower in trust property or in estates lost by breach of condition.

Same—Decree Declaring Trust—Who may not Complain.

4. The intention of the deceased wife having been to convey to her daughter alone, the son who was entitled to share in the mother's property only in the event the husband carried out his promise to make and keep effective the will in favor of both daughter and son, and who made common cause with the father in his endeavor to defeat the claim of the daughter, was not aggrieved by the decree declaring the father an involuntary trustee in the daughter's favor.

*Appeal from District Court, Fergus County, in the Tenth Judicial District; J. B. Poindexter, a Judge of the Fifth District, presiding.*

ACTION by Leonie Huffine against Alvin R. Lincoln and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Messrs. Gunn, Rasch & Hall, and Mr. E. K. Cheadle, for Appellants, submitted a brief, and one in reply to that of Respondent; Mr. M. S. Gunn argued the cause orally.

While from the time of the making of the contract in 1903 until 1910, the contract existed and was capable of being enforced, when defendant Alvin R. Lincoln married, as he had a right to do, he was relieved from performing his part of the contract. (*Owens v. McNally*, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710; *Gall v. Gall*, 19 N. Y. Supp. 332; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.) While the marriage may not have operated *ipso facto* to revoke the will of Alvin R. Lincoln, it nevertheless, by virtue of section 4747 of the Revised Codes relieved him from the performance of his contract and precludes a court of equity from decreeing specific performance of such contract, or granting relief equivalent thereto. (*Corker v. Corker*, 87 Cal. 643, 25 Pac. 922; *In re Larsen*, 18 S. D. 335, 5 Ann. Cas. 794, 100 N. W. 738; *In re Adler*, 52 Wash. 539, 100 Pac. 1019.)

The contract is not enforceable by the plaintiff because she is not a third party for whose benefit the contract was made,

within the provisions of the statute authorizing an action by a third party to a contract. (*McDonald v. American Nat'l Bank*, 25 Mont. 456, 65 Pac. 896; *Tatem v. Eglanol Mining Co.*, 45 Mont. 367, 123 Pac. 28; *Waite v. Wilson*, 86 App. Div. 485, 83 N. Y. Supp. 834; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Everdell v. Hill*, 58 App. Div. 151, 68 N. Y. Supp. 719.)

A contract to make a will disposing of real property is within the statute of frauds. (*Grindling v. Reyhl*, 149 Mich. 641, 15 L. R. A. (n. s.) 466, 113 N. W. 290; *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234; *Smith v. Smith*, 28 N. J. L. 208, 78 Am. Dec. 49; *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572; *Largey v. Leggat*, 30 Mont. 148, 157, 75 Pac. 950; *Levy v. Brush*, 45 N. Y. 589.)

If Alvin R. Lincoln is an involuntary trustee, the trust is an implied trust and was a secret trust as to the defendant Anna D. Lincoln. This being true, the trust cannot be enforced because of her dower right in the property. (*Richardson v. Schultz*, 98 Ind. 429; *First v. First*, 132 Ind. 572, 32 N. E. 731.)

Where confidential relations exist between a devisee and devisor, or grantor and grantee, and the devisee or grantee refuses to perform an oral promise to hold and dispose of the property in keeping with the wish and intention of the devisor, or grantor, a constructive trust arises, based upon the presumption that there was an intention not to fulfill the promise at the time it was made. (*Lafayette Street Church Soc. v. Norton*, 202 N. Y. 379, 95 N. E. 819, 39 L. R. A. (n. s.) 906, and extended note; *Crossman v. Keister*, 223 Ill. 69, 114 Am. St. Rep. 305, 8 L. R. A. (n. s.) 698, 79 N. E. 58; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9.) Here there is no room for such presumption as the facts conclusively show that the father acted in the utmost good faith in making the contract and fully intended to perform the same until after his marriage to Anna D. Lincoln. Under such circumstances there can be no constructive trust. (*Cassells v. Finn*, 122 Ga. 33, 106 Am. St. Rep. 91, 2 Ann. Cas. 554, 68 L. R. A. 80, 49 S. E. 749.)

The interest of George R. Lincoln in the property conveyed by his mother cannot be defeated by the refusal of the father to perform his contract. If a party intends to dispose of property to a particular person, and the intention is defeated by the fraudulent promise or conduct of another with the result that the title vests in the party guilty of the fraud and others, the court will impress a constructive trust upon the share of the guilty party in favor of the intended beneficiary, but cannot do more and the parties in whom the title vested, who were not participants in the fraud, will hold for their own benefit the title received by or for them. (*Powell v. Yearance*, 73 N. J. Eq. 117, 67 Atl. 893; *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541; *Beach v. Dyer*, 93 Ill. 295; *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 65, 60 Atl. 266; *Heinisch v. Pennington*, 73 N. J. Eq. 456, 68 Atl. 233.)

The consideration for the conveyance made by the mother pursuant to the contract having failed, by applying the principles of the law of contracts the property conveyed would revert to the mother if living, and, as she is dead, will revert to her heirs. (3 Paige on Contracts, 2279, 2280; *Glocke v. Glocke*, 113 Wis. 303, 57 L. R. A. 458, 89 N. W. 118; *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.) The heirs of the mother are entitled to a rescission of the contract, cancellation of the deed and a restoration of the property conveyed to the estate of the mother. In other words, the relief should place the parties in the position they would have occupied if the contract had not been entered into and the conveyance made.

*Messrs. Walsh, Nolan & Scallon, Mr. J. C. Huntoon, and Mr. E. W. Mettler*, for Respondent, submitted a brief; *Mr. Wm. Scallon* argued the cause orally.

The defendant, Alvin R. Lincoln, should be compelled to reconvey to the plaintiff in order to prevent the perpetration of a fraud and in order to carry out the wishes of the deceased grantor. In such circumstances as appear in this case the



grantee will be required to convey to the beneficiary intended by the grantor. (*Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430; *Lewis v. Lindley*, 19 Mont. 422, 48 Pac. 765; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; *Odell v. Moss*, 130 Cal. 356, 62 Pac. 555; *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116; *Ransdel v. Moore*, 153 Ind. 393, 53 L. R. A. 753, 53 N. E. 767; *Becker v. Neurath*, 149 Ky. 421, 149 S. W. 857; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245, 2 L. R. A. 662, 16 Atl. 464; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Winder v. Scholey*, 83 Ohio St. 204, 21 Ann. Cas. 1379, 33 L. R. A. (n. s.) 995, 93 N. E. 1098.) It would seem difficult to find a clearer case of constructive trust than the instant case.

If there be a constructive trust, in this case, it follows as a matter of course, that the plaintiff is the proper party to enforce it, for the trust arises in her favor and she is the beneficiary. (1 Perry on Trusts, sec. 105.) The cases cited above where similar trusts have been declared in favor of third parties, were cases in which the third parties were plaintiffs.

Anna D. Lincoln has no right of dower in the property in question. The burden is on her, on appeal, to show that she is entitled to such a right. The presumptions are against her. The mere fact of marriage is not conclusive. Moreover, dower does not attach to property subject to a trust. (Tiedeman on Real Property (3d ed.), sec. 88.) Appellants' contention finds no support except in some Indiana cases. Authorities generally are against it. (14 Cyc. 911, 912; *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; *Gritten v. Dickerson*, 202 Ill. 372, 66 N. E. 1090; *Kaphan v. Toney* (Tenn.), 58 S. W. 909; *Nelson v. Brown*, 164 Ala. 397, 137 Am. St. Rep. 61, 51 South. 360; *Givens v. Marbut*, 259 Mo. 223, 168 S. W. 614.) If she knew nothing about this property, it could hardly be said that she, in any manner, was induced by it to enter into the marriage. If she knew about the property, she would be chargeable with constructive notice of the trust, or what would be the

same thing, would be put upon her inquiry. A purchaser or encumbrancer of real property has constructive notice of conveyances on record. He is also chargeable with notice of the contents of the deed to his own grantor. Thereby she had constructive notice that this property had been conveyed to Alvin by his former wife, for a mere nominal consideration, as far as the deed showed. (*Childs v. Clark*, 3 Barb. Ch. 52, 49 Am. Dec. 164; *Pomeroy*, Equity (3d ed.), sec. 596.) The burden was upon her to set up and prove absence of knowledge of notice. (*Bliss on Code Pleading*, 395; *Lewis v. Lindley*, 19 Mont. 422, 441, 442, 48 Pac. 765; *Harrington v. Butte & B. M. Co.*, 27 Mont. 1, 12, 69 Pac. 102; *Thamling v. Duffey*, 14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363; *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402; *Eames v. Crozier*, 101 Cal. 260, 35 Pac. 873; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.)

MR. JUSTICE SANNER delivered the opinion of the court.

Stripped of legal verbiage, the findings of fact in this case [1] are: That on September 18, 1903, Alvin R. Lincoln and Mary E. Lincoln were husband and wife, living together as such; that Mary E. Lincoln was the owner in her own right of certain real estate which she then intended, and for a long time had intended, to convey to their only daughter, Leonie Huffine; that she was then dangerously ill and, resolving to carry out such intention, advised her husband accordingly; that he, possessing influence over her by reason of their confidential relations as husband and wife, exerted that influence to induce, and did induce, her to convey the property to him; that no consideration passed for such conveyance except his promise and agreement to devise all said property and all his own real estate to their daughter and their son George R. Lincoln in equal shares, upon which promise and agreement Mary E. Lincoln completely relied and but for which she would not have conveyed the property to him; that he then and there, as a part performance of said agreement and as a further inducement, executed such will and delivered the same to Leonie; that thereafter and on October 6,

1903, Mary E. Lincoln died leaving as heirs at law her husband, the defendant Alvin R. Lincoln, her daughter, the plaintiff Leonie Huffine, her son, the defendant George R. Lincoln, and two children of a deceased daughter; that in 1910 Alvin R. Lincoln married the defendant Anna D. Lincoln, and these two are now husband and wife; that in November, 1910, Alvin R. Lincoln repossessed himself of said will and thereafter repudiated the same and his agreement with Mary E. Lincoln, declaring that Leonie Huffine should have nothing from him and has threatened to dispose of the property conveyed to him by Mary E. Lincoln, in order to deprive and defraud Leonie of the same or any portion thereof; that he has formally revoked said will and made another which is now in force, bequeathing to Leonie a nominal sum only for the purpose of preventing her from breaking the same; that George has made common cause with his father in resisting Leonie's complaint, and denying the agreement between Alvin R. Lincoln and Mary E. Lincoln as alleged therein.

Upon these facts the court concluded as a matter of law that Alvin R. Lincoln became and is an involuntary trustee of the property conveyed to him by Mary E. Lincoln; that neither Anna D. Lincoln nor George R. Lincoln has any title, claim or interest in the premises; that Leonie Huffine is entitled to a conveyance thereof from Alvin R. Lincoln, free of all claims through or under him, and that a decree should be entered directing such conveyance. This appeal challenges the correctness of the judgment entered in so far as it accords with said findings and conclusions.

The first contention is that the agreement between Mary E. Lincoln and Alvin R. Lincoln is not enforceable at all because of the subsequent marriage of the latter, and is not enforceable at the instance of the plaintiff because "she is not a third party for whose benefit the contract was made, within the provisions of the statute authorizing an action by a third party to a contract." If, as the argument and cases cited seem to indicate, it is meant by this to urge that the contract between Alvin R.

Lincoln and Mary E. Lincoln cannot be specifically enforced by this plaintiff, the answer is that she does not ask, nor has the court adjudged, a specific performance. If, however, the contention is that the transaction is not cognizable by a court of equity at the suit of the plaintiff, then we say the defendants themselves have answered it by praying this court to reverse the judgment as entered and to direct a decree cancelling the conveyance from Mary E. Lincoln to Alvin R. Lincoln, allowing the property to pass in accordance with the law of descent.

The real question at issue is this: Do the facts found warrant the declaration of a trust of the property in Alvin R. Lincoln for the benefit of Leonie Huffine, and can such trust be now declared and enforced as against Anna D. Lincoln, George R. Lincoln, or the children of the deceased daughter? In moving toward the answer it is to be noted that arguments based upon the statutory restriction of a wife's power to devise her property to others than her husband (Rev. Codes, sec. 3735), are wholly irrelevant. The determination of Mary E. Lincoln was not to devise but to convey, and her right to convey cannot be open to doubt. (Rev. Codes, sec. 3700.) What her reasons were for this determination we may not definitely know, but it is a pure gratuity to assert that such conveyance was intended as a testamentary disposition rather than a conveyance *inter vivos* for the very best of considerations. Suffice it to know that her settled design was to convey to the daughter, and had it been carried out, title to the property would have vested in the daughter free of all claims by or under her father, her brother or anyone else.

That design was frustrated, as the court has found, by the influence and inducements of the father to his own advantage and, as it ultimately proved, to his daughter's disadvantage. These inducements were that if the mother would convey to him instead of to her daughter, he would make a will devising all the mother's property and all his own real estate to the daughter and son in equal shares. He made the will and she the conveyance. It is argued that inasmuch as he made the will, and in-

asmuch as his later revocation of it was perfectly legal, if not actually commanded by his subsequent marriage, no trust can be said to exist because there was no fraud. This is too narrow a view of the transaction. The thing contemplated was a will which should be and remain effective; only on the understanding that the daughter and son alike should come into all the property, would the mother forego her design to convey her property to the daughter. The transaction was between parties who stood in the highest of confidential relations, and it is to be judged accordingly. (Rev. Codes, sec. 3694.) It called for a continued performance on the part of the husband, viz.: the maintenance of such a will, and of his intention to do this, the mere making of the will is not conclusive. He may have actually intended to repudiate his promise, or he may have mentally reserved to do as he saw fit, once the property was safely in his hands; if he did either, there was actual fraud in the inception. (Rev. Codes, sec. 4978, subd. 4.) The trial court however, did not expressly find that he did either, but rested its conclusions upon his subsequent repudiation. The case is thus made analogous to those wherein an intended testamentary disposition has been changed or thwarted by the promise or engagement of one in confidential relationship with the intended donor and to the advantage of the promisor. In such cases, as well as in those where the disposition is not testamentary but is the fruit of confidence, the overwhelming weight of authority is that the promisor takes his advantage subject to the performance of his promise, and that subsequent repudiation is a fraud which operates to warrant the declaration of a trust without regard to the promisor's intention when the promise was made; or the presumption will be indulged, if necessary, that the promise was made without intention to fulfill it, and was therefore fraudulent. In our opinion, the existence of a trust in this case cannot be gainsaid. (See *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116; *Fisk's Appeal*, 81 Conn. 433, 71 Atl. 559; *Schneringer v. Schneringer*, 81 Neb. 661, 116 N. W.

491; *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; 90 Cal. 323, 329, 27 Pac. 189; *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430; *Young v. Peachy*, 2 Atk. 254; *Thompson's Lessee v. White*, 1 Dall. (Pa.) 425, 1 Am. Dec. 252; *Stahl v. Stahl*, 214 Ill. 131, 105 Am. St. Rep. 101, 2 Ann. Cas. 774, 68 L. R. A. 617, 73 Atl. 319; *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245, 2 L. R. A. 662, 16 Atl. 464; Note 106 Am. St. Rep. 95 *et seq.*; Note 8 L. R. A. (n. s.) 698 *et seq.*; Note 31 L. R. A. (n. s.) 176 *et seq.*; Note 39 L. R. A. (n. s.) 960 *et seq.*; Note 21 Am. & Eng. Cas., 1384 *et seq.*)

There is just as little doubt of plaintiff's right to have the [2] trust declared and enforced. "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." (Rev. Codes, sec. 5373.) The thing prevented by the promise made and broken was a conveyance of the mother's property to the daughter alone; she, but for that promise, would have had the property which the defendant Alvin R. Lincoln now has. The trust, therefore, which exists here is a trust in her favor, and she is the real party in interest upon whom is devolved the privilege of maintaining appropriate action.

The judgment is assailed as depriving Anna D. Lincoln of any dower right in the property. If she has such right, the judgment should undoubtedly be modified to recognize it; but this is all that could be required, supposing such right to exist, since it is a mere inchoate interest which may never vest. Gen- [3] erally speaking, however, a wife has no dower in trust property or in estates lost by breach of condition. (1 Scribner on Dower, pp. 392 *et seq.*; 14 Cyc. 911; note 22 L. R. A. (n. s.) 691 *et seq.*) To avoid this rule, the defendants assert that the right of dower which comes to the wife in virtue of marriage, is an interest acquired by purchase, and therefore cannot, under Code section 4539, be prejudiced by a trust of which the wife had no notice at the time of the marriage. We think the premise

may be doubted, and we question whether the section invoked has any application. Assuming, however, that the premise is sound, the section applicable and the conclusion correct as a proposition of logic, the defendants are in nowise advanced. The trust being established, Anna D. Lincoln had *prima facie* no dower; she could have it only by showing a want of notice (*Lewis v. Lindley*, 19 Mont. 422, 442 *et seq.*, 48 Pac. 765; *Weber v. Rothschild*, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650), and, so far as this court is concerned, presenting a finding or the improper refusal of a finding to that effect. No such finding appears, no complaint of its absence, no showing that it would have been justified by the evidence. In this situation we are authorized to infer in aid of the judgment, that she did have notice, particularly in view of the undisputed fact that the property came to her husband by conveyance from his former wife, for which conveyance there was no consideration save marital confidence.

Finally the judgment cannot stand, it is said, because the [4] defendant George is not responsible for the situation now presented, and neither he nor the grandchildren should be cut off from their share of Mary E. Lincoln's property. This ignores the fact that Mary E. Lincoln never did intend this property to pass by the law of succession. She intended to convey it; and she did convey it, not, as she desired, to the daughter who alone would have been entitled to it, but to Alvin R. Lincoln because of his promise and engagement to devise it and his property to that daughter and the son. The son became entitled to share it only if the father kept his promise. If the father broke his promise, the son was free to feel aggrieved thereby, but if he is entitled to recompense, it is not at the expense of the plaintiff, who has done him no wrong. The wrong, if any done to him was by the father, and that wrong the son, on the face of this record, waives, denies and defends. In so doing he exhibits an accurate perception of his situation, for the trust here presented exists for the benefit of the person who, but for

the engagement made and broken, would have come into the property.

The conclusions of law are justified by the findings of fact, and the judgment follows both. It is therefore affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

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RYAN CO., RESPONDENT, v. RUSSELL, APPELLANT.

(No. 3,704.)

Submitted September 22, 1916. Decided November 8, 1916.)

[160 Pac. 000.]

*Breach of Contract—Material Variance—New Trial.*

1. The variance presented on the trial of an action for the breach of a contract of sale of cattle in which plaintiff relied, not upon the contract as written and set out in the complaint, but upon a modification thereof not pleaded, to the effect that a portion of the cattle should be delivered at a place different from that originally agreed upon, at an additional cost to the seller, was such as may have prejudiced defendant, who was, therefore, entitled to a new trial.

*Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.*

ACTION by the E. B. Ryan Company against Ed. Russell, from a judgment for plaintiff and from an order denying him a new trial, defendant appeals. Reversed and remanded.

Mr. O. F. Goddard and Mr. John G. Skinner, for Appellant, submitted a brief; Mr. Goddard argued the cause orally.

Messrs. Johnston & Coleman, for Respondent, submitted a brief; Mr. Henry J. Coleman argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1912 the E. B. Ryan Company and Edw. Russell entered into a contract in writing by the terms of which Russell sold and agreed to deliver to the company 800 head, more or less, of mixed cattle then running on the range, at \$40 per head;



delivery to be made on or about September 22, 1912, at Billings, but the expense of moving the cattle from Leverton bridge to be borne by the company. Two thousand dollars was paid on the purchase price and the balance was to be paid upon delivery. This action was brought to recover damages for an alleged breach of the agreement.

The complaint makes the contract a part of it and alleges that [1] defendant delivered only 617 head of the cattle and failed and refused to deliver the remaining 183 head, to plaintiff's damage in the sum of \$1830. The answer admits the execution of the contract but denies any breach or any damages. As a further defense it is alleged that defendant actually gathered from the range and turned over to the plaintiff 767 head of the cattle, but through the negligence of plaintiff 150 head escaped back to the range; that it was then mutually agreed by the parties that the delivery of 617 head should be deemed a substantial compliance with the terms of the agreement and that defendant should be absolved from further compliance. These affirmative allegations were put in issue by reply. Upon the trial E. B. Ryan testified for the plaintiff that after a portion of the cattle had been gathered from the range, it was mutually agreed between the parties that 110 head should be turned over to a party at Absarokee to whom plaintiff had resold them; that the remainder of those already gathered should be driven to Billings, counted and paid for, and that this was all done; that 507 were actually delivered at Billings; that it was further agreed that defendant should have a reasonable time thereafter to gather the remaining 183 head and that, when gathered, defendant should deliver them at Columbus, where plaintiff would receive them for shipment to Billings. At the conclusion of plaintiff's case in chief, defendant moved for a nonsuit upon the ground of a material variance between the plaintiff's pleading and proof. Before the motion was passed upon; plaintiff asked leave of court to amend the complaint so as to plead the modification as well as the original contract. Each of these applications was denied. The trial resulted favorably to plaintiff, and defendant appealed from the judgment and from an order denying him a new trial.

Counsel for respondent concede that there was a variance between plaintiff's pleading and proof, but insist that it was not of sufficient consequence to warrant a new trial. The pur-

pose of pleadings is to present the issues for trial. The complaint in this case is intended to set forth in legal and logical form the plaintiff's cause of action, and, with the answer and reply, to present a proposition affirmed on the one hand and denied on the other. The object of the complaint is to apprise the defendant of the precise points upon which he will be called to offer proof.

Our Codes recognize three degrees of disagreement between pleadings and proof. A *material* variance is one which actually misleads the adverse party to his prejudice in maintaining his action or defense upon the merits. (Sec. 6585, Rev. Codes.) An *immaterial* variance is a discrepancy between the pleading and proof of a character so slight that the adverse party cannot say that he was misled thereby. (Sec. 6586.) A *failure of proof* results when the evidence offered so far departs from the cause of action pleaded that it may be said fairly that the allegations of the pleading in their general scope and meaning are unproved. (Sec. 6587.) If the variance is a material one the court should permit the pleading to be amended, upon such terms as may be just. (Sec. 6585.) If the variance is immaterial the court may direct the facts to be found according to the evidence, or may permit the pleading to be amended without the imposition of terms. (Sec. 6586.) If there is a failure of proof, of course there is no ground for amending and the offending party is out of court. From necessity these statutes are very general in their terms. No hard and fast rule can be prescribed for determining whether in a given instance a party has actually been misled to his prejudice. Every case must depend upon its own peculiar facts and circumstances.

In this action plaintiff gave notice in the complaint that reliance would be placed upon the written contract pleaded and that defendant must be prepared to meet the claim that a breach of that particular contract would constitute the gist of plaintiff's case. The evidence offered by plaintiff disclosed that the original contract as written had been modified by a subsequent agreement and that it was the failure of defendant to comply with this modified portion, that gave rise to plaintiff's principal complaint. To determine whether this variance was a material one, the trial court should have applied either of two tests: (1) If the modification had been pleaded in the complaint and defendant in his answer had denied that any such modification had ever been made, would the issue thus raised have been a material one calling for proof? Or (2) would the evi-

dence of a breach of the contract pleaded be sufficient to show a breach of the contract as modified?

The modification changed the time of delivery of the 183 head of cattle; changed the place of their delivery from Billings to Columbus, and imposed upon the defendant the expense of their delivery. At least this is the implication from Ryan's testimony. He said: "We agreed, while it was storming, to bring these cattle on to Billings and then he [defendant] was to go back and put up his hay and gather the balance of these cattle and deliver them at Columbus, in the stock yards there and I was to ship them."

It is often difficult to distinguish between a material variance and a failure of proof, and this record illustrates the difficulty as well as one could. We are inclined to the view that it cannot be said that the allegations of the complaint in their general scope and meaning were unproved, but the variance was such as in the ordinary course of the trial of a lawsuit would prejudice the defendant. He may not have been able to demonstrate that he was unable to meet the changed conditions solely because he had not been notified of plaintiff's claim that the original contract had been modified; but the character of the variance was such that the statement by his counsel that defendant was taken by surprise, that he was not prepared to meet the evidence of the modification, and that he would be prejudiced in making his defense on the merits, should have been accepted as sufficient proof of the facts.

In the absence of any request by plaintiff to amend, the defendant would have been entitled to a nonsuit on account of the variance. The request to amend should have been granted upon such terms as would enable defendant to plead to the amendment and prepare to meet the issue thus raised. Without the amendment in the record the defendant's motion should have been granted.

The justice of the case requires that a new trial be had in order that the pleadings may be redrafted properly and the cause tried upon its merits and upon a correct theory. The judgment and order are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

## OPINION ON MOTION FOR REHEARING.

(Submitted December 5, 1916. Decided December 14, 1916.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In their motion for rehearing, counsel for respondent direct our attention to the fact that in the opinion heretofore rendered we held in effect that the original contract had been modified by an unexecuted oral agreement. Such was not our purpose. The use of the word *oral* in the opinion was a mere inadvertence and the term will be eliminated. There is nothing in the evidence to warrant the assumption that the subsequent agreement was oral. If it is one required to be in writing, the law presumes it was in writing. It was not our purpose to prejudge the character of the subsequent agreement or to consider it further than was necessary to determine that there was a material variance between plaintiff's pleading and proof, rather than a complete failure of proof, and we reached our conclusion by adopting respondent's theory—repeatedly referred to in his brief—that the subsequent agreement amounted only to a modification of the original contract, rather than a substitution for it.

We considered the case from the standpoint of the parties when the motion for nonsuit was made, and it was our purpose to leave them in the position which they occupied when respondent asked leave of court to amend his complaint. We said: "The request to amend should have been granted," and we remanded the cause in order that plaintiff might have the relief which he asked from the trial court, but which was denied him.

It is not for this court to say what proceedings shall be had in the case after the amendment is made, or whether it is possible for plaintiff to succeed upon his complaint as amended.

The opinion heretofore delivered is amended as indicated, and the motion for rehearing is denied.

*Rehearing denied.*

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, having been absent, took no part in the original opinion and takes no part in this.

HERLIHY, EXECUTOR, RESPONDENT, v. DONOHUE ET AL.,  
APPELLANTS.

(No. 3,849.)

(Submitted June 24, 1916. Decided November 10, 1916.)

[160 Pac. 000.]

*Trespass—Militia—Officers—Destruction of Property—Justification—Pleading—Governor—Powers—State—Police Power—Subordinate Military Officers—Civil Liability.*

**Militia — Trespass — Destruction of Property — Civil Liability — Justification—Pleading.**

1. The defense in an action in trespass that, while engaged in restoring law and order in a city proclaimed by the governor to be in a state of insurrection, defendants, as officers of the organized state militia, were justified in having plaintiff's stock of liquors destroyed for an alleged infraction of a rule limiting their sale to certain hours, must be specially pleaded both at common law and under the Codes; in the absence of such pleading, evidence to show justification was inadmissible.

**Same—Destruction of Property—Due Process of Law.**

2. Conceding (but not deciding) that an order of the commanding officer of the state militia closing saloons during certain hours in times of public disorder has the force and effect of a statute, yet punishment for disobedience of such an order by way of destruction of the stock of liquors of the offender, without notice, a hearing or an adjudication is unwarranted, and for their destruction he is liable in damages.

**Same—Governor—Powers.**

3. The Constitution and laws of the state are the charters of the governor's powers, and in them he must find the authority for his official acts.

**Same—State—Police Power—Extent.**

4. Under its police power, the state may regulate or control every act or thing within its jurisdiction which tends to subvert the government, to injure the public, to destroy the morals of the people, or to disturb the peace and good order of society.

**Same—Destruction of Private Property—Compensation.**

5. It is only within the narrow limits of actual and pressing necessity that private property may be taken and destroyed for the public good.

**Same—Subordinate Officers—Civil Liability—Rule.**

6. A subordinate officer of the state militia may defend his acts against civil liability by reference to the order of his superior officer, unless it is so palpably illegal or without authority that a reasonably prudent man ought to recognize its invalidity or want of authority, in which event obedience furnishes no excuse for a wrongful act even though disobedience may subject the offender to punishment at the hands of a military tribunal.

**Same—Subordinate Officers—Civil Liability—Case at Bar.**

7. Inasmuch as the commanding officer of the state militia might, if the circumstances of the case warranted it, lawfully have given an

order for the destruction of a stock of intoxicating liquors in times of public disorder which he had been directed by the governor to suppress, subordinate officers commanded to carry out the order to destroy were, under the rule last above stated, relieved from civil liability for the ensuing damage.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Michael Herlihy, as executor of the estate of Dennis Herlihy, deceased, against Dan J. Donohue and others. Judgment for plaintiff. Defendants appeal. Affirmed.

*Mr. J. B. Poindexter*, Attorney General; *Mr. W. H. Poorman*, Assistant Attorney General; *Mr. Jesse B. Roote*, and *Mr. H. C. Hopkins*, for Appellants, submitted a brief; *Mr. Poorman* argued the cause orally.

There is not any presumption of law that either a public official or private individual has the indisputable right to destroy private property, neither is there any presumption that a public official either maliciously, or wantonly, or unnecessarily, injures or destroys private property, but there is a presumption: "That official duty has been regularly performed." (Sec. 7962, Rev. Codes; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410.) The presumption which protects the individual in his private rights, and the presumption which protects the officer in his official rights, being equal, the burden is cast upon the plaintiff to establish every material fact, unaided by presumption. "So far as presumptions are concerned, the evidence is at equipoise at the very outset of the case. The scales can be made to dip in plaintiff's favor only by the presentation on his part of further evidence." (*Cooper v. Romney*, 49 Mont. 119, 128, Ann. Cas. 1916A, 596, 141 Pac. 289.) And in this case where the officials were charged and commanded both by the law and the supreme executive authority of the state to conduct a military campaign in the suppression of a long-continued, well-organized and determined insurrection, the destruction of individual liberty, human life and property, were well within the official's authority when apparently necessary to enable him

to discharge his official duty (*In re McDonald*, 49 Mont. 454, Ann. Cas. 1916A, 1166, L. R. A. 1915B, 988, 143 Pac. 947), and the burden was on the plaintiff to prove not only ownership, destruction and value of the property, but that it was destroyed without reason or apparent or real necessity.

The general defense relied upon by the defendants was that they were acting in an official capacity, charged with the performance of a certain duty, to-wit: suppression of an insurrection; that the force with which and in which they were acting was not a mere plan, but that the national guard was a real entity, recognized by both state and federal authority, governed by the same rules that govern any army in its operations as such. In other words, that the military force is the last appeal; that it is called into requisition only when all other agencies have failed; and that it *must* succeed or chaos and anarchy will result. From the very nature of things it is, therefore, vested with plenary power to do and perform everything which is apparently necessary to the accomplishment of its purpose. (*Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 98 Am. St. Rep. 759, 65 L. R. A. 193, 55 Atl. 952; *Moyer v. Peabody*, 212 U. S. 78, 53 L. Ed. 410, 29 Sup. Ct. Rep. 235; *Luther v. Bordon*, 7 How. (U. S.) 1, 12 L. Ed. 581; *Mitchel v. Harmony*, 13 How. (U. S.) 115, 14 L. Ed. 75; *Hatfield v. Graham*, 73 W. Va. 759, L. R. A. 1915A, 175, 81 S. E. 532; *Riggs v. State*, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272; *State v. Brown*, 71 W. Va. 519, 77 S. E. 243, Ann. Cas. 1914C, 1, 45 L. R. A. (n. s.) 996, 1024; *United States v. Clark*, 31 Fed. 710; *In re Boyle*, 6 Ida. 609, 45 L. R. A. 832, 96 Am. St. Rep. 286, 57 Pac. 706; Haire's American Const. Law, 924, 917.) The destruction of the liquor was a military necessity, and if any recovery may be had by the plaintiff by reason of the fact that he violated orders, that recovery must be had from the government, and not from the official. (*Drehman v. Stifel*, 41 Mo. 184, 97 Am. Dec. 268, affirmed in 8 Wall. (U. S.) 595, 19 L. Ed. 508; *Wellman v. Wickerman*, 44 Mo. 486.

*Messrs. Maury, Templeman & Davies, Mr. Edwin M. Lamb, and Mr. M. J. Doepker, for Respondents, submitted a brief; Mr. H. L. Maury and Mr. Doepker argued the cause orally.*

Appellants admit that respondent's stock of liquor was destroyed by them; they seek to excuse themselves from liability by pleading justification in their order closing the saloons after seven P. M. and before eight A. M. They do not plead necessity for destruction of the liquor, as imperative, if their order was to be obeyed, but merely allege that "the commanding officer, with certain of his subordinates, officers and soldiers, destroyed the said stock of liquor belonging to plaintiff herein, as a necessary measure to prevent drunkenness, breaches of the peace, and rioting, and as an example to other liquor dealers." "Private property is sacred from the violent interference of others, and whoever takes, injures or destroys it, is a trespasser unless he shows justification. Necessity—*extreme, imperative and overwhelming*—may constitute such justification, but expediency or utility *will not answer*. (*McLaughlin v. Green*, 50 Miss. 465; see also *Fluke v. Canton*, 31 Okl. 718, 123 Pac. 1049; *Franks v. Smith*, 142 Ky. 232, Ann. Cas. 1912D, 319, L. R. A. 1915A, 1141, 134 S. W. 484; *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. Ed. 281; *In re McDonald*, 49 Mont. 454, Ann. Cas. 1916A, 1166, L. R. A. 1915B, 988, 143 Pac. 947.)

The matter set up in justification is insufficient as a matter of law. Necessity—*extreme, imperative and overwhelming*—may constitute a justification, but expediency or utility will not be sufficient. (*McLaughlin v. Green, supra*; *Hale v. Lawrence*, 21 N. J. L. (1 Zab.) 714, 47 Am. Dec. 190; *Meadows v. Gulf, C. & S. F. R. Co.*, 48 Tex. Civ. 466, 107 S. W. 83.)

As to appellants' contention that the court committed error by excluding a line of evidence as to the rights, duties and immunities of subordinate military officers in yielding obedience to the commands of a superior officer, we urge to the contrary that the weight of authority is conclusively against this contention, see *Franks v. Smith, supra*, wherein the supreme court of Kentucky considered carefully and spoke positively,



that a member of the state militia as a soldier in active service is not relieved from civil liability for his acts while so engaged on the ground that he acted in obedience to orders received through the regular military channels. (See, also, 2 Hare's American Constitutional Law, 760, *et seq.*; *Hogue v. Penn.*, 3 Bush (Ky.), 663, 96 Am. Dec. 274.)

Answering appellants' contention as to the burden of proof, respondent submits that the presumption as to official duty being regularly performed is rebutted as soon as plaintiff established that they destroyed the property of Dennis Herlihy;—this fact being admitted in the affirmative defense—the burden of proof, if there was any, was immediately shifted to the defendants to show by a preponderance of evidence that such destruction was justified. (*Lake Shore & M. S. Ry. Co. v. Felton*, 103 Fed. 227, 43 C. C. A. 189.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On September 1, 1914, the governor of this state issued a proclamation declaring the county of Silver Bow in a state of insurrection. A portion of the organized militia under command of Major Dan J. Donohue, with Wm. Morse and Wade Gobel, subordinate officers, was ordered to the scene of the trouble for the declared purpose of restoring peace and good order and rehabilitating the civil authority in that county. Upon taking command of the troops Major Donohue issued an order closing saloons and other places where intoxicating liquors were for sale. This order was thereafter modified so as to permit such places to be open for business from 8 A. M. until 7 P. M. daily. On September 19 Major Donohue ordered Morse, Gobel and certain enlisted men to take from the saloon of Dennis Herlihy the stock of liquors therein and destroy the same, and the order having been executed, this action in trespass was brought to recover actual damages to the amount of the value of the property destroyed, and punitive damage in the sum of \$1,000.

The complaint alleges the ownership and value of the property, the trespass and destruction of the property, and that the defendants acted wrongfully and with malice. The answer consists of a general denial and certain affirmative allegations which set forth the proclamation of the governor, the original and amended order by the commanding officer, and allege that the plaintiff Dennis Herlihy, while the amended order was in full force and effect and with knowledge of such order, willfully violated the same by opening his saloon and dispensing intoxicating liquors within the prohibited hours of September 17; that at the time there was great disorder in Silver Bow county; that the commanding officer "had reason to believe and to expect that certain of the insurrectionists in said county, and law-breakers therein, would cause riots to occur, and do violence to both property and human life; that in view of these facts said commanding officer of said military forces believed that it was imperatively necessary to forbid the sale or distribution or giving away of intoxicating liquors later than seven o'clock in the evening and before eight o'clock in the morning; and in order to prevent the plaintiff herein from furnishing liquors to persons within the hours during which persons were forbidden to sell or furnish liquors to others, the said commanding officer, with certain of his subordinate officers and soldiers, destroyed the said stock of liquors belonging to the plaintiff herein as a necessary measure to prevent drunkenness, breaches of the peace and rioting, and as an example to other retail liquor dealers to prevent them as well as the plaintiff herein from either selling or giving away intoxicating liquors later than seven o'clock in the evening, and before eight o'clock in the morning."

The reply admits the official character of each of the defendants; admits that the proclamation, the order and amended order were issued; that the appealing defendants destroyed the property in question, and denies all other facts pleaded by way of defense. After issues were joined, but before trial, Dennis Herlihy died and the executor of his last will was substituted as a party to the action. Upon the trial plaintiff abandoned his

claim for punitive damages, made out a *prima facie* case in other respects, and called Major Donohue as a witness to prove the destruction of the property. On cross-examination counsel for defendants sought to prove the facts pleaded in the answer and denied by the reply, but the offered evidence was excluded as not within the range of proper cross-examination. In their case in chief defendants again offered the same character of evidence but it was objected to upon the following, among other, grounds: "That there is no plea in the answer that the destruction of the property or any of the property was at all necessary to prevent the increasing or spreading out of the insurrection or to aid in suppressing any insurrection."

The objection was sustained and the evidence was excluded. The court dismissed the action as to certain other defendants originally joined, and directed a verdict in favor of plaintiff and against these appealing defendants, leaving to the jury for determination the amount of compensatory damages only. From a judgment entered upon a verdict for plaintiff, this appeal is prosecuted. The correctness of the trial court's ruling in excluding defendants' offered evidence is the question presented for review.

1. The right of a person to acquire, hold and protect property; to be secure in his possession of it against unreasonable seizure, and to retain it until deprived of it by due process of law, is, as among English-speaking people, as old as the common law itself. Its origin antedates by many years the guaranty contained in *Magna Charta*. The right itself was the inheritance of our people who inhabited the territory acquired from Great Britain at the close of the Revolution, and was adopted by the people of the territory of Montana by its first legislative assembly, and was continued in force thereafter. It is now embodied in the Bill of Rights, Article III of our state Constitution. When, therefore, plaintiff alleged and proved his ownership of the property; its destruction by these defendants without his consent, and his damages consequent upon that act, he made out a *prima facie* case. Indeed, in the light of the pleadings, little proof was required from plaintiff, for by their admission of

plaintiff's ownership and their destruction of the property, defendants rendered themselves liable in nominal damages at least unless they could offer legal justification for their act. The answer considered in its entirety must be viewed as in the nature of a confession and avoidance—an admission of the destruction of private property and an attempt to justify it.

That it is possible for a set of circumstances so to combine as to present a legal justification for the act of a public officer [1] in destroying private property against the will of the owner and leaving the owner remediless, cannot be gainsaid. The contention made in the trial court and here is that, though these defendants might possibly have set forth facts sufficient to constitute a defense, they failed to do so; in other words, that the facts pleaded do not constitute a justification for the *destruction* of plaintiff's property. That a defense of this character must be specially pleaded was the rule at common law. It is also the rule in most of the states where the Code system prevails, and in this jurisdiction by statute. (Subd. 2, sec. 6540, Rev. Codes.)

Let it be conceded in the first instance that the order of [2] Major Donohue closing the saloons from 7 P. M. until 8 A. M. daily, had the force and effect of a statute; and that for a violation of that order any reasonable punishment might have been inflicted; still we cannot concede to the organized militia, or to any department of our government, or to any function of government, the right to convict and punish without notice, a hearing or an adjudication. Before any punishment could be inflicted upon Herlihy, notice of the charge against him, an opportunity for him to prepare and present his defense, if any he had, and an adjudication of his guilt by some competent tribunal, were indispensable. It is nowhere contended that Herlihy pleaded guilty, while the charges preferred against him in the answer are denied in the reply. The answer fails to allege that Herlihy was accused, notified, tried or convicted before his property was confiscated, and in the absence of these necessary allegations the question of the extent of the punishment which might have been inflicted, does

not arise. Under this answer the destruction of the property cannot be justified as a penalty imposed for a violation of the order. Neither can it be justified, as "a military necessity." The stock of liquors was not needed for, nor devoted to, the use of the troops. A state of war did not exist and the destruction of the property was not necessary to prevent it falling into the hands of the enemy.

The defense must rest upon the theory that the order was a reasonable and necessary police regulation and the destruction of the property a valid exercise of the state's police power. The order in question as amended would read as follows:

"5. All saloons and places where intoxicating liquors are sold at retail as a beverage will be closed at once and kept closed [except from 8 A. M. until 7 P. M. daily] until further orders. The stock of liquors of any person or persons violating this rule will be destroyed and all violators severely punished." By section 5, Article VII, of the Constitution, the supreme executive power is vested in the governor, who is charged with the duty to see that the laws are faithfully executed. Section 6 provides the means available to the executive, when necessary, to execute the power or perform the duty devolved upon him: "The governor shall be commander-in-chief of the militia forces of the state, \* \* \* and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion." When the organized militia was called into the service of the state in 1914, it but performed the function of the strong arm of the executive by which he could aid in executing the law or in suppressing the insurrection. Independently of the executive it had no power or authority, except possibly with reference to its own internal affairs. It acted as an executive agency, subject to the orders of the governor and bound by the authority which he might lawfully exercise. The governor is at all times [3] amenable to the Constitution and laws of the state. They are the charters of his powers and in them he must find the authority for his official acts. While he may not exceed their bounds in any instance, he may invoke any remedy provided

by them for the purpose whenever the exigencies of a particular case call for it. One of the instrumentalities the use of which is sanctioned by the law for the preservation of peace and good order, is the police power of the state; and while no court or text-writer has assumed to define with accuracy the limits of the [4] power, it may be said generally that the state may regulate or control every act or thing within its jurisdiction which tends to subvert the government, to injure the public, to destroy the morals of the people, or to disturb the peace and good order of society. That the state may enforce a proper police regulation by the imposition of fine or imprisonment, or both, is [5] conceded generally. That within the narrow limits of *actual and pressing necessity*, private property may be taken and destroyed for the public good, scarcely admits of debate. The most common illustration of this is the demolition of a building to prevent the spread of a conflagration. But in every instance where such a right has been exercised and questioned, the decision upholding the right makes it clear beyond controversy that only the most overriding necessity will justify or excuse the officer ordering such destruction.

It is not alleged that the rioters in Butte were threatening or about to break into Herlihy's saloon to obtain intoxicating liquors and that destruction of the stock was necessary to prevent the excesses which might reasonably be expected to follow the free access of disorderly disposed persons to the liquors. It is not pretended that the arrest and imprisonment of Herlihy and the closing of his place of business during the insurrection would not have been equally efficacious as a means of preventing drunkenness, disorder or rioting. Under constitutional government such as ours, the destruction of private property without compensation to the owner must be the last resort, available only in the presence of imminent and overwhelming necessity which brooks no delay. In failing to allege facts sufficient to disclose such necessity, the answer fails to make out a justification for the trespass, and for this reason the offered evidence was properly rejected.

2. Upon the trial, evidence was introduced to the effect that defendants Morse and Gobel were concerned in the destruction of the property to the extent only that they obeyed the order of their superior officer. This was not controverted and may be accepted as an established fact.

The circumstances under which a subordinate military officer [6] may be acquitted for acts otherwise wrongful, upon the score that he merely obeyed a command from one over him in authority, have received much consideration. The authorities are not agreed upon the question presented here, and a review would be of little, if any, aid. To permit an inferior military officer to stop and question the validity of every command of his superior, would at once destroy discipline and convert an army into a debating society without a monitor or referee. The same Constitution which guarantees the security of life and property, provides for organized military forces in this state. When our people adopted the Constitution with its reference to the militia, they must have had in contemplation militia organized, officered and disciplined as such forces were generally at the time. An army without discipline is a mob. The highest duty of the soldier is to obey, for upon obedience all discipline must depend. Necessity is the foundation for organized military forces, and to the extent that necessity requires it, obedience to orders is demanded. But necessity can never require obedience to an order manifestly illegal or beyond the authority of the superior to give, and therefore reason and common sense seem to justify the rule that the inferior military officer may defend his acts against civil liability by reference to the order of his superior, unless such order bears upon its face the marks of its own invalidity or want of authority. If the order is one which the superior might lawfully make, the inferior cannot refuse obedience until he shall have investigated the surrounding circumstances and determined for himself that they justify the order in the particular instance. If, on the other hand, the order is so palpably illegal or without authority that any reasonably prudent man ought to recognize the fact, obedience thereto furnishes no excuse for a wrongful act, even though disobedience

may subject the offender to punishment at the hands of a military tribunal.

In the present instance the order for the destruction of the [7] property was one which Major Donohue might lawfully have made if the circumstances of the case warranted it, and since it was valid on its face, the subordinate officers could not refuse obedience until they instituted and carried on their own investigation to ascertain whether the surrounding circumstances justified it. They could rely upon its apparent validity and justify their acts in obeying it. We believe the views expressed are in harmony with enlightened reason and best serve the double purpose of securing private rights and protecting subordinate military officers in the execution of the duty which they may be called upon to perform.

The judgment against the defendant Donohue is affirmed. The cause is remanded to the district court with directions to enter judgment dismissing the action as against defendants Morse and Gobel. The respondent may recover one-half of his trial court costs and one-half of his costs on appeal from the defendant Donohue. The defendants Morse and Gobel may recover from respondent one-half of the trial court costs incurred by the appealing defendants and one-half of the costs incurred by appellants on appeal.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.



# MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

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No. 3,724.—A. W. MILLER, RESPONDENT, *v.* TIMES-JOURNAL PUB. CO., APPELLANT.

*Appeal from District Court, Rosebud County; Daniel O'Hern, Judge.*

Decided January 31, 1916.

PER CURIAM.—Appellant's motion to dismiss appeal herein from an order refusing to dissolve a temporary injunction, is hereby granted and the appeal is accordingly dismissed.

*Messrs. Loud, Collins, Wood, Campbell & Leavitt, for Appellant.*

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No. 3,810.—STATE *EX REL.* E. DEMITROFF, RELATOR, *v.* DISTRICT COURT *ET AL.*, RESPONDENTS.

Original application for writ of prohibition directed to the district court of Silver Bow County, and J. J. Lynch, a Judge thereof.

Decided February 14, 1916.

PER CURIAM.—Relator's application for a writ of prohibition is this day, after due consideration, denied.

*Mr. Harry Meyer and Mr. S. C. Ford, for Relator.*

No. 3,685.—MAUD E. SHEEHAN, RESPONDENT, v. CHAS. S. KONNING, APPELLANT.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

Decided February 21, 1916.

PER CURIAM.—On motion of appellant, the appeal herein is hereby dismissed.

*Mr. W. D. Rankin and Mr. L. Sulgrove, for Appellant.*

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No. 3,747.—C. H. MCKINNEY, APPELLANT, v. ROSE C. BRESNAHAN, RESPONDENT.

*Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.*

Decided March 9, 1916.

PER CURIAM.—It is ordered that the appeal herein be, and the same is hereby, dismissed in accordance with the stipulation of counsel.

*Mr. Earl F. Angell, for Appellant.*

*Mr. J. H. Duffy, for Respondent.*

No. 3,698.—STATE EX REL. JOS. T. BERTHELOTE, RELATOR,  
v. J. B. LESLIE ET AL.

Original application for writ of mandate against the District Court of Cascade County, and J. B. Leslie, a judge thereof.

Decided March 11, 1916.

PER CURIAM.—Relator's motion to dismiss the application herein is hereby granted and the cause is accordingly dismissed.

*Mr. L. V. Beaulieu*, for Relator.

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No. 3,827.—STATE EX REL. JOHN NELSON, APPELLANT, v.  
MAYOR OF THE CITY OF BUTTE ET AL., RESPONDENTS.

*Appeal from District Court, Silver Bow County.*

Decided March 20, 1916.

PER CURIAM.—Respondent's motion to dismiss the appeal herein, because of delay in filing transcript, is hereby granted.

*Mr. W. E. Carroll*, for Appellant.

*Messrs. J. V. Dwyer, John A. Groeneveld, and Mr. N. A. Rotering*, for Respondents.

No. 3,828.—STATE EX REL. OLAF OLSON, APPELLANT, v. MAYOR OF THE CITY OF BUTTE ET AL., RESPONDENTS.

*Appeal from District Court, Silver Bow County.*

Decided March 20, 1916.

PER CURIAM.—Respondent's motion to dismiss the appeal herein, because of delay in filing transcript, is hereby granted.

*Mr. W. E. Carroll, for Appellant.*

*Messrs. J. V. Dwyer, John A. Groeneveld, and Mr. N. A. Rotering, for Respondents.*

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No. 3,798.—MOSE VANINA, APPELLANT, v. FRANK MARTINUCCI ET AL., RESPONDENTS.

*'Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

Decided March 22, 1916.

PER CURIAM.—Respondents' motion to dismiss the appeal herein is, after due consideration, granted and the appeal accordingly dismissed.

*Mr. Lewis A. Smith, for Appellant.*

*Mr. Jas. H. Baldwin, for Respondents.*

No. 3,838.—MINOR YORK, RESPONDENT, v. ZIMMERMAN CO., APPELLANT.

*Appeal from District Court, Yellowstone County.*

Decided April 8, 1916.

PER CURIAM.—Respondent's motion to dismiss appeal herein because of defendant's failure to file transcript in time, is, after due consideration, granted and the appeal accordingly dismissed.

*Messrs. Nichols & Wilson, for Appellant.*

*Mr. C. R. Ingle, for Respondent.*

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No. 3,703.—JOHN W. BLAIR ET AL., APPELLANTS, v. W. H. McELWAIN, RESPONDENT.

*Appeal from District Court, Powell County; Geo. B. Winston, Judge.*

Decided April 28, 1916.

PER CURIAM.—Pursuant to stipulation of the parties herein, it is ordered that the appeal in the cause be, and the same is hereby, dismissed.

*Messrs. Hamblen & Gilbert, Mr. W. J. Paul, and Messrs. Scharnikow & Jordan, for Appellants.*

*Mr. S. P. Wilson, for Respondent.*

No. 3,872.—LOUIS S. COHN CO., RESPONDENT, *v.* POWER  
CITY DRUG CO. ET AL., APPELLANTS.

*Appeal from District Court, Sanders County.*

Decided May 20, 1916.

PER CURIAM.—Respondent's motion to dismiss the appeal herein is granted, with leave to appellant to reinstate.

*Mr. A. S. Ainsworth*, for Respondent.

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No. 3,868.—STATE EX REL. STUEWE ET AL., RELATORS, *v.*  
DISTRICT COURT, RESPONDENTS.

Original application for writ of supervisory control directed to the district court of Lewis and Clark County and R. Lee Word, Judge.

Decided June 2, 1916.

PER CURIAM.—The motion to quash the order to show cause herein, heretofore argued and submitted, is hereby sustained and the proceeding dismissed.

*Mr. Henry C. Smith*, for Relators.

*Mr. Ed. Horsky* and *Mr. Wm. H. Poorman*, for Respondents.

No. 3,947.—STATE *EX REL.* EDWIN L. NORRIS, RELATOR,  
*v.* DISTRICT COURT *ET AL.*, RESPONDENTS.

Original application for writ of mandate to the district court of Phillips County and Frank N. Utter, Judge thereof.

Decided October 16, 1916.

PER CURIAM.—It is ordered that a peremptory writ of mandate issue herein, directing the respondent judge to permit the firm of Norris & Hurd to assist the county attorney of Phillips County in the prosecution of the case of *State v. James*.

*Messrs. Norris & Hurd*, for Relator.

*Messrs. Slattery & Kline*, for Respondents.

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No. 3,788.—W. E. THISTLEWOOD, RESPONDENT, *v.*  
CHICAGO, MILWAUKEE & S. P. RY. CO., APPELLANT.

*Appeal from District Court, Gallatin County; Ben B. Law, Judge.*

Decided October 18, 1916.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with the stipulation of counsel herein.

*Mr. W. S. Hartman*, for Appellant.

*Mr. C. E. Carlson* and *Messrs. Dunn & Carlson*, for Respondent.

No. 3,916.—IN RE DANIEL J. MCGINLEY'S ESTATE.

*Appeal from District of Ravalli County; Theodore Lentz, Judge.*

Decided November 1, 1916.

PER CURIAM.—On motion of respondents, Claud Hopkins and Earl Robbins, in the above-entitled cause, to dismiss the appeal herein, for failure on the part of appellant to file brief within the time allowed by subdivision 2 of Rule X of this court, it is ordered that the appeal be, and it is hereby, dismissed.

*Messrs. Johnson & Tucker, for Appellant.*

*Messrs. O'Hara & Madeen, for Respondents.*

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No. 3,952.—STATE EX REL. ANDREW J. JOHNSON, RELATOR,  
v. DISTRICT COURT ET AL., RESPONDENTS.

Application for writ of review, directed to the District Court in and for Fergus County, and Roy E. Ayers, Judge thereof.

Decided November 13, 1916.

PER CURIAM.—Pursuant to the stipulation of the respective parties herein, respondents confessing error, the alternative writ heretofore issued is made absolute and the order complained of annulled.

*Messrs. Walsh, Nolan & Scallon, and Messrs. Mettler & Briscoe, for Relator.*

*Mr. O. W. McConnell, for Respondents.*



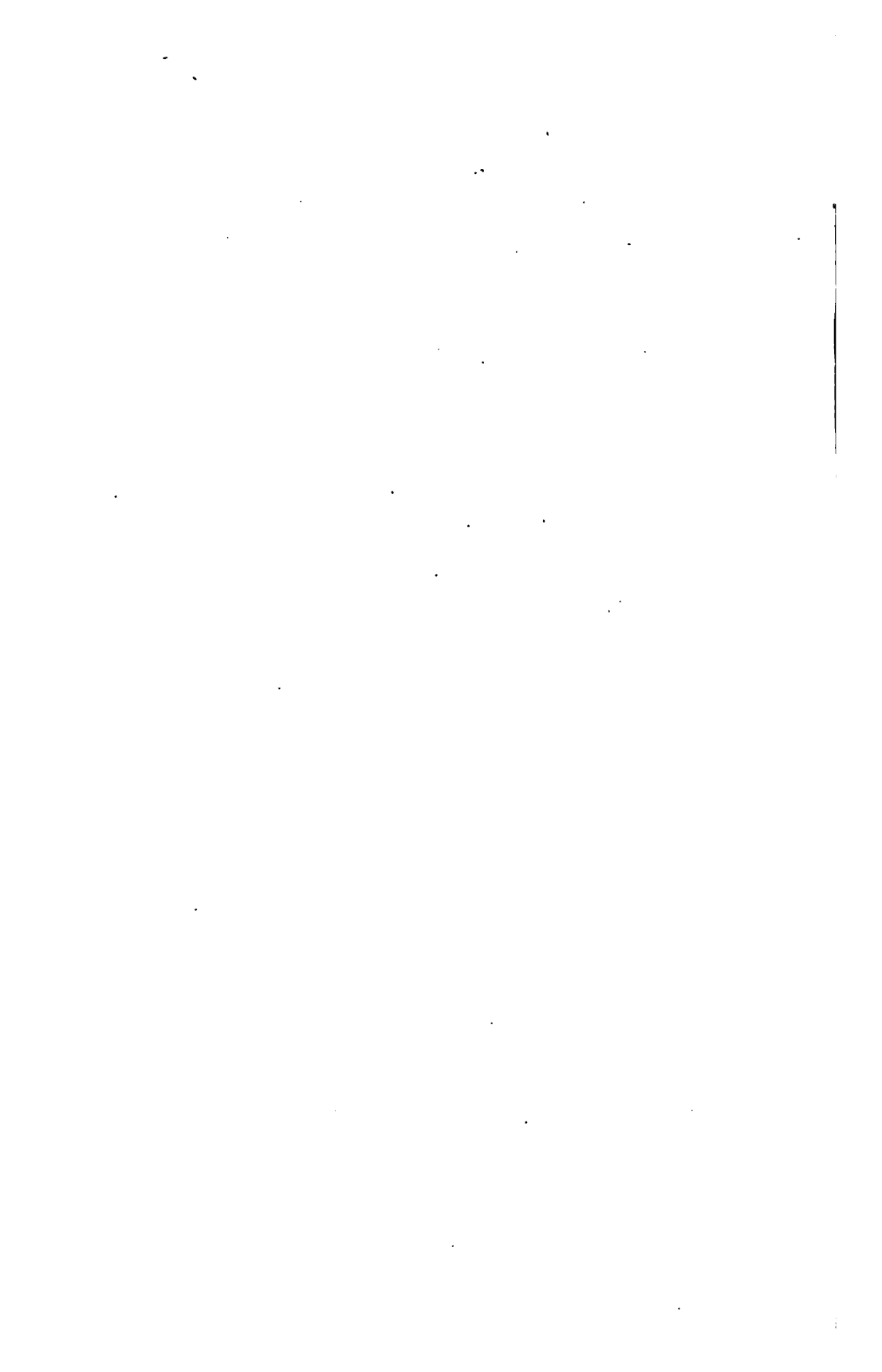
No. 3,821.—STATE *EX REL.* JOS. E. THORPE, RELATOR, *v.*  
JOHN W. TATTAN, JUDGE, RESPONDENT.

Original application for writ of supervisory control directed to John W. Tattan, as Judge of the Twelfth Judicial District.

Decided November 14, 1916.

PER CURIAM.—The order to show cause herein having come on for hearing, and the respective parties having failed to appear, the court ordered the application submitted. Thereupon the same was this day, after consideration, ordered dismissed at the cost of the relator.

*Mr. H. S. McGinley*, for Relator.



## INDEX—VOL. 52.

### ABANDONMENT.

See Waters and Water Rights, 2-4.

### ACTIONS.

Taxpayer's suit,—see Injunction, 2.

Survival—Breach of Promise—Seduction.

1. Under section 6494, Revised Codes, an action for either breach of promise or seduction survives, and may be maintained against the administrator of the estate of defendant.—*Kennedy v. Bogan*, Admr., 242.

### ADVERSE CLAIM.

Water Right—Subsequent Appropriation—Notice.

1. A subsequent appropriation of water is not any notice of an adverse claim.—*Moore v. Sherman*, 542.

### AGENCY.

See Principal and Agent.

### AMENDMENTS.

Of pleadings—Refusal,—see Pleading and Practice, 15.

### ANIMALS.

Trespassing—Fences.

1. To enable an owner of land to recover for damage done thereto by a band of sheep straying thereon while being moved across country, he need not show that the land was inclosed with a legal fence or that the trespass was the result of the willful and intentional act of the defendant.—*Chilcott v. Rea*, 134.

Want of Legal Fence—Trespassing—Absence of Liability.

2. Where animals which may lawfully run at large are turned loose on the public range or highway, and, following their own inclinations, invade premises not inclosed with a legal fence, no cause of action arises.—*Chilcott v. Rea*, 134.

When Owner Liable.

3. Where animals are held in herd, their movements being directed or controlled by their owner or his employees who know, or are chargeable with knowledge of, the boundaries of adjacent private property, and they invade such property through either the willful act or the negligence of either, such invasion is an actionable trespass, and the want of a legal fence is immaterial.—*Chilcott v. Rea*, 134.

Trespass—Insufficiency of Evidence—New Trial.

4. Where, under the evidence in an action for trespass on land by driving sheep thereon for pasturage, the plaintiff was clearly entitled to a verdict in some amount, a verdict for defendants for nominal damages on a counterclaim which was unsupported by proof was error, and a motion for a new trial was properly granted.—*Coburn Cattle Co. v. Hensen*, 252.

**Same—Actual or Constructive Possession of Land Sufficient.**

5. Actual or constructive possession is sufficient to maintain an action of the nature of the one referred to above.—*Coburn Cattle Co. v. Hensen*, 252.

**Same—Title—When Record Evidence Required.**

6. The rule that in an action for trespass on land plaintiff must, in order to prevail, tender record proof of title, applies only to cases in which he is not in actual possession, but is compelled to rely upon constructive possession under his record title.—*Coburn Cattle Co. v. Hensen*, 252.

### APPEAL AND ERROR.

**Trial—Reading supreme court opinion,—see Discretion, 1.**

**Defective Decree—Harmless Error.**

1. Error in a decree perpetually enjoining a city from assuming jurisdiction over territory illegally attempted to be annexed, without limiting its effect to the particular proceeding then at bar, *held* harmless. *Sharkey v. City of Butte*, 16.

**Public Officers—Undertaking on Appeal.**

2. Under section 7196, Revised Codes, the board of examiners for nurses, being a public office and its members public officers, is relieved from filing a bond on appeal from a judgment compelling it by writ of mandate to recommend to the governor an applicant for certification as a registered nurse.—*State ex rel. Scollard v. Board of Examiners*, 91.

**Punitive Damages—Instructions—Refusal—Harmless Error.**

3. Where no evidence tending to show malice on the part of a police officer in arresting plaintiff had been introduced, and the jury—judging from the amount of the verdict, must have refused to award exemplary damages, error in submitting instructions on the subject of punitive damages *held* harmless.—*Slifer v. Yorath*, 129.

**Conflict in Evidence—Verdict Conclusive.**

4. Where the evidence on the question at issue was conflicting, the verdict of the jury will not be disturbed on appeal.—*Stone v. Maynard*, 147.

**Trial—Error—Rendered Harmless During Progress of.**

5. Error committed which is rendered harmless during the progress of the trial, and therefore cannot prejudice the complaining party, is insufficient to impeach a judgment.—*Fowlie v. Cruse*, 222.

**Quieting Title—Trial—Inconsistent Theories—New Trial.**

6. Where, on appeal from an order denying a new trial in an action to quiet title to a strip of land granted for a railroad right of way, neither counsel agreed with the other nor with the trial court as to the theory or theories upon which the cause was tried, and the two theories apparently adopted by the court—estopped *in pais* and mutual mistake in the description of the land in the deed—were contradictory of each other, a new trial *held* proper.—*B. M. Cobban Realty Co. v. Chicago etc. Ry. Co.*, 256.

**Who may Appeal—Persons “Aggrieved.”**

7. Where judgment is rendered against parties for costs for which they are liable on execution, they are “aggrieved” within the meaning of the statute, and may appeal.—*Eustance v. Francis*, 295.

**Removal of Causes—Bill of Exceptions—Record on Appeal.**

8. An order denying a petition to remove a cause to the federal court cannot be reviewed on appeal where it is not brought into the record by bill of exceptions with the petition and bond, properly authenticated.—*De Sandro v. Missoula Light & Water Co.*, 333.

**Law of the Case.**

9. Where a second trial is had upon the same pleadings and substantially the same evidence as upon the first, the decision on the first appeal is the law of the case on the second.—*Wallace v. Chicago, Milwaukee & P. S. Ry. Co.*, 345.

**Costs on Appeal—Order of Supreme Court—District Courts—Jurisdiction.**

10. Over an order made by the supreme court granting a new trial "at the costs of respondents," which became final upon issuance of the *remittitur*, the district court had no jurisdiction; hence a motion of respondents to tax costs was properly denied.—*In re Williams' Estate*, 366.

**Taxing Costs—Nonappealable Orders.**

11. The costs incurred become a part of the judgment, and their disposition is reviewable only on an appeal from that judgment, and not from an order taxing or refusing to tax them.—*In re Williams' Estate*, 366.

**Intoxicating Liquors—License—Transfer—Appeal—Moot Questions.**

12. Where, after an appeal from a judgment affirming a decision of the county commissioners refusing an application for the renewal of a liquor license, the county in question became subject to the local option statute, the appeal held to present only moot questions, inasmuch as a new trial, if error occurred, would not avail appellant.—*Honstain v. Board of County Commissioners*, 391.

**Default Judgment—Justices' Courts—Appeal.**

13. An appeal to the district court lies from a judgment by default rendered by a justice of the peace.—*Taylor v. Combs*, 427.

**Nonsuit—Correct Result—Wrong Reason.**

14. If a ruling granting a nonsuit was correct, though based upon an erroneous reason, it will nevertheless be affirmed.—*Henroid v. Gregson Hot Springs Co.*, 447.

**Record—Judgment-roll.**

15. If the record on appeal from an order denying a new trial, made upon the minutes of the court, contains certified copies of all the papers which go to make up the judgment-roll, it need not embody a copy of the latter authenticated as such.—*Stokes v. Long*, 470.

**Nonsuit—Review of Evidence.**

16. Where defendant introduces evidence after his motion for nonsuit is denied, the court, on appeal, will consider only the question whether the evidence as a whole made a case for the jury.—*Stokes v. Long*, 470.

**Harmless Error—Erroneous Instruction Favorable to Appellant.**

17. Appellant cannot complain of an instruction, even though incorrect, which was as favorable to him as he could ask.—*Stokes v. Long*, 470.

**Error in Instructions—Duty of Appellant.**

18. On motion for new trial, neither the district nor the supreme court on appeal can consider any error in instructions not specifically pointed out at the time of settlement thereof.—*Stokes v. Long*, 470.

**Appeal—Presumptions.**

19. In entering upon its investigation of an appeal, the supreme court indulges the presumption that the ruling of the trial court is correct; and if its order directing a verdict of not guilty can be justified upon any ground, it will be upheld.—*State v. Rocky Mountain Elevator Co.*, 487.

**Right Result—Wrong Reason.**

20. If the right result was reached by the trial court, it is immaterial that an erroneous reason was assigned for it.—*State v. Rocky Mountain Elevator Co.*, 487.

**Briefs—Assignments of Error—Insufficiency.**

21. General assignments that the evidence is insufficient to sustain the verdict in a criminal cause, and that the verdict is against law, without pointing out the particulars in which the former is insufficient and the latter is against law, do not entitle the appellant to a review thereof. *State v. Lewis*, 495.

**Documentary Evidence—Value—Review.**

22. Where a proceeding was submitted to the district court wholly upon documentary evidence, the supreme court may on appeal as readily determine its value as could the trial court.—*State ex rel. Hauswald v. Ellis*, 505.

**Harmless Error.**

23. For alleged error in a ruling which worked to the advantage of appellant, rather than to his prejudice, a new trial will not be ordered. *Interstate Power Co. v. Anaconda Copper Min. Co.*, 509.

**Theory of Case—Appeal.**

24. Where a personal injury case against a carrier was tried as though the latter's duty to provide safe conveyances was governed by the common law and without regard to section 5301, Revised Codes, it will be determined on appeal under the same theory.—*Batch v. Helena L. & Ry. Co.*, 517.

**APPROPRIATIONS.**

See, also, *Constitutional Law*, 13, 16.

Unlimited as to time,—see *Constitutional Law*, 12.

**APPURTENANCES.**

See *Waters and Water Rights*, 6-8.

**ASSESSMENT.**

See *Taxation*.

**ASSIGNMENT.**

Of mortgage,—see *Mortgages*, 26-28.

Of overdue note,—see *Mortgages*, 29.

Of proceeds of judgment—Execution—*Sheriffs*,—see *Sheriffs*, 1.

**ASSIGNMENTS OF ERROR.**

See *Appeal and Error*, 21.

**ATTORNEY GENERAL.**

Duties, in county seat election contest,—see *Elections*, 6.

**ATTORNEYS.**

Compensation of substitute for county attorney,—see *County Attorneys*, 4, 5.

Construction of contract of employment,—see *Contracts*, 2-6.

Fees,—see *Costs*, 2-5.

Misconduct during trial,—see *New Trial*, 2-4.

**Professional Misconduct—Disbarment.**

1. A county attorney who used the powers of his office, by issuing warrants for the arrest of persons and filing informations against

others, to compel them to make monetary settlements favorable to clients in his civil practice, was guilty of such misconduct as to warrant his disbarment.—*In re Bunston*, 83.

#### AUTOMOBILES.

Street accident,—see *Personal Injuries*, 9-17.

#### BANKS AND BANKING.

Accepting overdue notes without inquiry—Effect,—see *Negotiable Instruments*, 11, 12.

Wrongful Dishonoring Checks—Damages—Presumptions.

1. In an action for damages for the wrongful dishonor of a trading customer's check, which accrued before the enactment of Chapter 90, Laws of 1915, limiting the bank's liability to damages actually proven, plaintiff was not required to show malice or present evidence of tangible loss, but could rely upon the presumption which allowed him substantial damages, temperately measured.—*Crites v. Security State Bank*, 121; *Ward v. State Bank of Yates*, 328.

Excessive Verdict.

2. Where a bank through mistake dishonored a trading customer's check, but upon discovery of the mistake notified the payee and paid it with costs of protest, and plaintiff showed neither malice on the bank's part nor actual damage, a verdict for \$500 held excessive, and scaled to \$200.—*Crites v. Security State Bank*, 121.

#### BILLS AND NOTES.

See *Negotiable Instruments*.

#### BILLS OF EXCEPTIONS.

Settlement may be compelled by *mandamus*,—see *Mandamus*, 1, 2.

Settlement—Duty of District Judge.

1. Since "settlement" of a bill of exceptions, as required by section 6788, Revised Codes, means the elimination of all unnecessary matter and the incorporation of all matter necessary to present the exceptions, the judge to whom a bill is presented cannot refuse to settle it merely because it does not contain all the proceedings or the evidence and contains misstatements of facts, but in such case he must require the bill to state the truth and fairly exhibit the exceptions saved, strike out useless matter, and then sign the bill with his certificate as required by the statute.—*State ex rel. Lindsey v. Ayers*, 62.

#### BOARD OF EXAMINERS FOR NURSES.

See *Nurses*, 1-5.

#### BONDS AND UNDERTAKINGS.

Public officers,—see *Nurses*, 1.

#### BREACH OF PROMISE.

Survival of action,—see *Actions*, 1.

#### BRIEFS.

Insufficiency of assignments of error,—see *Appeal and Error*, 21.

## BURDEN OF PROOF.

Right to liquor license,—see Intoxicating Liquors, 3.

Water right appurtenant to land conveyed,—see Waters and Water Rights, 6.

False Imprisonment—Justification.

1. In an action for false imprisonment, the burden of proving justification for the arrest of the plaintiff by defendant police officer was upon the latter after the former had made out a *prima facie* case by testifying that while peaceably on his way home he was arrested without explanation or charge.—*Slifer v. Yorath*, 129.

Deed of Trust—Right of Redemption.

2. The right of redemption being statutory, the burden is upon anyone, claiming by or under it, to show its existence, and that he is in a position to invoke its benefit.—*The Banking Corporation of Montana v. Hein*, 238.

Death in Natatorium—Negligence.

3. In an action to recover damages for the death of a minor by drowning in defendant's natatorium, it was incumbent upon plaintiff administrator to make out a *prima facie* case of actionable negligence in favor of the deceased in his lifetime and against the defendant.—*Henroid v. Gregson Hot Springs Co.*, 447.

## CARRIER AND PASSENGER.

See Personal Injuries, 1-5, 34-37.

## CERTIORARI.

Return—Contents.

1. Under section 7206, Revised Codes, recitals, denials, affirmative allegations or matters not copied from the records, or matters copied from the records but not called for by the writ of review, are out of place in the return, do not constitute any part of it, and will be disregarded. *State ex rel. Sell v. District Court*, 457.

## CHANGE OF VENUE.

See District Courts, 7.

## CHATTEL MORTGAGES.

See Mortgages, 2-5.

## CHILDREN.

See Juvenile Delinquents; Minors.

## CITIES AND TOWNS.

See, also, Public Service Commission.

Powers—When to be Denied.

1. Whenever there is a fair and reasonable doubt of the existence of a power, in a municipal corporation, either expressly conferred or necessarily implied, to do a certain thing, the doubt must be resolved against its exercise.—*Sharkey v. City of Butte*, 16.

Annexation of Territory—Inclusion of Unplatted Ground.

2. Under section 3214, Revised Codes, a city may not extend its boundaries so as to include unplatted ground.—*Sharkey v. City of Butte*, 16.



**Same—Illegal Procedure—Effect.**

3. Proceedings had by a city to annex territory a portion of which was unplatted, contrary to statutory provision (Rev. Codes, sec. 3214), were void *in toto*.—*Sharkey v. City of Butte*, 16.

**Same—Direct and Collateral Attack.**

4. Where the purpose of a taxpayer's action was to have proceedings looking to the annexation of territory to a city declared void *ab initio* and the city enjoined from assuming jurisdiction over the persons or property situated within unplatted territory illegally sought to be included, the attack was direct, and not collateral.—*Sharkey v. City of Butte*, 16.

**Same—Remedy—Injunction.**

5. Injunction *held* to be a remedy available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city.—*Sharkey v. City of Butte*, 16.

**Same—Resolution of Council—Untrue Statement—Effect.**

6. The recital in a city council's resolution that territory proposed to be annexed to the city was contiguous and platted, when such was not the fact, could not inure to the city's benefit, or preclude a resident of the territory attempted to be annexed, from any available remedy he would otherwise have.—*Sharkey v. City of Butte*, 16.

**Same—Defective Decree—Harmless Error.**

7. Error in a decree perpetually enjoining a city from assuming jurisdiction over territory illegally attempted to be annexed, without limiting its effect to the particular proceeding then at bar, *held* harmless.—*Sharkey v. City of Butte*, 16.

**Workmen's Compensation Act—Compulsory as to Cities.**

8. *Held*, that plan No. 3 provided by the Workmen's Compensation Act (Laws 1915, Chap. 96, p. 168) is, as to a city, exclusive, compulsory and obligatory upon both employer and employee.—*City of Butte v. Industrial Accident Board*, 75.

**Police Power—Destruction of Private Property—State Fire Marshal.**

9. To warrant a city in destroying, through its chief of the fire department, under its police power, or the state fire marshal in ordering destroyed, private property for the public welfare, facts constituting an emergency justifying an invasion of private rights must appear; hence it was no defense for a chief of a city fire department, in an action to recover damages for the destruction of a building, to aver, without stating facts, that he obeyed the orders of the state fire marshal in acting as he did.—*Smith v. McCormick*, 324.

**Special Improvement Districts—Faulty Description—Effect.**

10. By a resolution to create a special improvement district described as being bounded by certain lots, such lots were not incorporated in, but excluded from, the proposed district.—*City of Lewistown v. Warr*, 353.

**Same—Assessment—Description of District—Definiteness.**

11. Proceedings for the imposition of a special improvement tax are *in invitum*, and before property can be held subject to the burden, it must be described with sufficient certainty that the owner cannot be misled; it being the intention of the statute that the resolution of intention shall contain a description of the proposed district by a line which marks its exterior boundaries.—*City of Lewistown v. Warr*, 353.

**Same—Creation—Estoppel by Joining in Petition.**

12. Where an owner joined in a petition for the creation of a special improvement district, and thereafter in creating it a large part of the property described therein was excluded by the city council, the petitioner was not estopped to subsequently attack the validity of its crea-

tion by the fact that he joined in the petition.—*City of Lewistown v. Warren*, 356.

**Same—Estoppel—Payment of Installment of Tax.**

13. To estop a taxpayer from attacking the validity of the creation of a special improvement district by payment of an installment of the tax, the payment must have been voluntarily made.—*City of Lewistown v. Warren*, 356.

**Same—Estoppel—Payment of Installment of Tax—Prejudice.**

14. Defendant city could not have been prejudiced by the payment of an installment of a special improvement tax, which, being invalid, it was not entitled to collect, and was therefore not in position to claim an estoppel.—*City of Lewistown v. Warren*, 356.

**Injunction—Police Officers—Physical Examination—Complaint—Insufficiency.**

15. The complaint of a city taxpayer which omitted to show that he was a police officer, or that he would suffer a special injury by a resolution of the council authorizing the appointment of a commission to make a physical examination of the members of the police force for the purpose of ascertaining whether any one of them had, by reason of old age or disease, become permanently incapacitated to discharge the duties of his office, was, under section 6643, Revised Codes, insufficient as a basis for an injunction to restrain the examination or the incurring of the expense incident to it.—*Larkin v. City of Butte*, 410.

**Metropolitan Police Law—Powers.**

16. Under section 3314, Revised Codes, the city council may furnish assistance to the mayor, in the form of a commission, to determine the physical competency of the members of the police force.—*Larkin v. City of Butte*, 410.

**Unauthorized Expenditures—Complaint—Insufficiency.**

17. A complaint against a city alleging an unauthorized purchase of apparatus was insufficient to warrant an injunction in the absence of an averment that a claim in payment thereof had been presented to and allowed by the council.—*Larkin v. City of Butte*, 410.

**Water Plants—Indebtedness—Powers.**

18. The power exercised by a city under section 3259, subdivision 64, to issue bonds and procure, own and control a water system, is proprietary in character, as distinguished from its governmental capacity. *Public Service Commission v. City of Helena*, 527.

#### COLLATERAL ATTACK.

See *Cities and Towns*, 4.

#### COMPROMISE.

See *Evidence*, 4.

#### CONDEMNATION PROCEEDINGS.

See *Eminent Domain*.

#### CONSTITUTIONAL LAW.

**Destruction of property without due process of law,—see *Militia*, 1-6.**

**Freedom of press,—see *Contempt*, 3.**

**Workmen's Compensation Act—Sufficiency of Title.**

1. *Held*, that the Workmen's Compensation Act (Chap. 96, Laws 1915), applies to counties and county employees, the contention that its title

is insufficient to warrant their inclusion in the body of the measure, under section 23, Article V, of the Constitution, being untenable.—*Lewis and Clark County v. Industrial Accident Board*, 6.

Same—Class Legislation—Donations.

2. *Held*, further, that the Act above, as applied to county employees, is neither obnoxious as class legislation, nor in violation of the constitutional prohibition against donations to individuals.—*Lewis and Clark County v. Industrial Accident Board*, 6.

Same—Taxation—"Public Purpose."

3. The question whether a particular purpose for which taxes may be levied and collected is a public one, under section 11, Article XII, Constitution, is for the legislature in the first instance, and courts will indulge every reasonable presumption in favor of the legislative decision in this respect.—*Lewis and Clark County v. Industrial Accident Board*, 6.

Same.

4. Taxes levied to provide a fund to be devoted to the relief of injured employees of a county which is subject to the provisions of the Workmen's Compensation Act, *held* to be for a public purpose, and therefore not obnoxious as offending against the provision of section 11, Article XII, of the Constitution.—*Lewis and Clark County v. Industrial Accident Board*, 6.

Criminal Law—Public Trial.

5. In a prosecution for rape, the court made an order that on account of the nature of the case no one should be allowed in the courtroom in addition to those then present, and those present, after once leaving, could not return, court officers, doctors, attorneys and newspapermen being excluded from the order. *Held* that by an enforcement of the order the defendant was denied the right to a public trial guaranteed by section 16, Article III, of the Constitution, to one charged with crime. (MR. JUSTICE SANNER dissenting.)—*State v. Keeler*, 205.

Constitutional Construction—Rule.

6. The provisions of the state Constitution must be construed in the light of the conditions prevailing in Montana at the date of its adoption.—*State v. Keeler*, 205.

District Courts—Authority of Substitute Judges—"Hold Court."

7. To "hold court," within the meaning of the Constitution, Article VIII, section 12, authorizing one district judge to hold court for another, is to hold court in the district just as does the local judge, and not to sit in chambers in another district.—*Eustance v. Francis*, 295.

Equal Protection of the Laws—Discrimination.

8. Within the meaning of the Fourteenth Amendment to the United States Constitution, a privilege conferred upon one class is a discrimination in favor of that class and against all others not similarly favored, as a burden upon one class is a discrimination against it and in favor of all others not similarly burdened.—*Hill v. Rae*, 378.

Same.

9. A privilege or a burden is or is not a denial of the equal protection of the laws, under the Fourteenth Amendment, *supra*, according to whether the discrimination relates to a matter upon which classification is legally permissible, and, if so, whether the classification is a reasonable one.—*Hill v. Rae*, 378.

Classification—To be Upheld, When.

10. If the classification adopted by the legislature in enacting a statute conferring a privilege is practical, it is not reviewable unless palpably arbitrary.—*Hill v. Rae*, 378.

**Construction of Statutes—Wisdom of Legislation.**

11. In determining the constitutionality of a statute, the supreme court may not concern itself with the accuracy or wisdom of the view entertained by the legislature in enacting it.—Hill v. Rae, 378.

**Appropriations—Constitutionality.**

12. Section 12, Article XII, of the state Constitution, forbidding appropriations for a longer term than two years, operates as an automatic limit, so that an unlimited appropriation as to time will expire at the end of two years, and is not void *ab initio*.—Hill v. Rae, 378.

**Same—Separate Bills.**

13. Where an appropriation is a mere incident to a larger, but single, subject of legislation, it need not be made by separate bill as otherwise required by section 33, Article V, of the Constitution.—Hill v. Rae, 378.

**Statutes—Partial Invalidity.**

14. The insertion of a void provision in an Act otherwise valid does not render it inoperative as a whole unless the objectionable clause is indispensable to its operation or constituted the inducement to its enactment.—Hill v. Rae, 378.

**Same—Constitutionality—Who may not Question.**

15. One not prejudicially affected by unconstitutional clauses of a statute is not entitled to complain of its unconstitutionality.—Hill v. Rae, 378.

**Farm Loans—Appropriations—Lending Credit of State—Constitution.**

16. *Held*, that the provision of Chapter 28, Laws of 1915, appropriating \$20,000 to serve as a guaranty fund to assure prompt payment of interest on farm loan bonds, is void under section 35 of Article V of the Constitution, because the funds thus appropriated are "not under the absolute control of the state," and under section 1, Article XIII, because by it the credit of the state is given as an assurance for the benefit of those who may become lenders under the Act.—Hill v. Rae, 378.

**Same—Exemptions—Equal Protection of Laws.**

17. Inasmuch as the exemption from payment of fee for recording the mortgage placed upon his land for a loan obtained under the Farm Loan Act is not for the benefit of the farmer—the borrower—but for that of the lender—the real mortgagee—the discrimination between the latter and all other mortgagees *held* to vitiate the Act so far as the exemption is concerned, under the equal protection of the law clause of the Constitution.—Hill v. Rae, 378.

**Mortgages—Renewal Against Owner's Consent.**

18. If by Chapter 27, Laws of 1913, it was intended to enable a mortgagee whose mortgage had been extinguished by lapse of time, to revitalize the security and impose a lien upon property without the owner's consent, it to that extent deprives him of his property without due process of law, and is invalid.—Berkin v. Healy, 398.

**Jury Trial.**

19. Under section 23, Article III, of the state Constitution, the right of trial by jury is preserved as it existed at the time the Constitution was adopted.—Davidson v. Davidson, 441.

**Constitution—Legislative Construction.**

20. While the legislative construction of a constitutional provision is not conclusive, it is entitled to respectful consideration, particularly when it has been uniform and has extended over a considerable period of time, unchallenged in the courts.—Northern Pac. Ry. Co. v. Brogan, 461.

**Validity of Statute—Necessity for Determining.**

21. The validity of a statute will not be determined on appeal unless such determination is necessary to a decision of the particular case.—*State v. Rocky Mountain Elevator Co.*, 487.

**Police Power—Surrender of.**

22. Though no specific provision of the Constitution forbids it, the legislature is without authority to surrender altogether the police power. *Public Service Com. v. City of Helena*, 527.

**Statutes—Constitutionality—Who may not Question.**

23. One not affected by a statute will not be heard to question its constitutionality.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

**Same—Rule.**

24. In determining the constitutionality of statutes, courts look beyond the mere form of expression to the object and purpose of the legislation.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

**Poll Taxes—Due Process of Law.**

25. The statute imposing a poll tax *held* not subject to the objection (sec. 1, 14th Amendment, U. S. Constitution) that in failing to provide for notice before the tax is levied and collected, it deprives the taxpayer of his property without due process of law.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

**Same—Nature of Imposition—Equal Protection of Laws.**

26. *Held*, that the statute imposing a poll tax is a police regulation designed to carry into effect the provision of section 5, Article X, of the Constitution, making it incumbent upon the counties of the state to care for their poor; that such an imposition is not a "tax" within the meaning of the Constitution and revenue measures generally, and therefore not subject to the uniformity rule or other restrictions incident to such measures.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article	I,	section	2	575
Article	I,	section	9	575
Article	III			607
Article	III,	section	2	576
Article	III,	section	10	54
Article	III,	section	16	212, 219
Article	V,	section	23	7
Article	V,	section	26	288
Article	V,	sections	33, 34	388
Article	V,	section	35	389
Article	V,	section	36	539
Article	VII,	sections	5, 6	609
Article	VIII,	section	3	53, 290
Article	VIII,	section	11	290
Article	VIII,	section	12	298
Article	VIII,	section	19	375
Article	X,	section	5	577
Article	XII,	section	4	540
Article	XII,	section	6	576
Article	XII,	section	11	12
Article	XII,	section	12	388
Article	XII,	section	16	425, 462 <i>et seq.</i>
Article	XII,	section	17	425
Article	XIII,	section	1	12, 388
Article	XIII,	section	6	534 <i>et seq.</i>

Article XVI, section 2.....	288
Article XIX, section 1.....	96
Article XX, section 1.....	51

## CONTEMPT.

## Power to Punish.

1. The power to punish for contempt is inherent in courts of record and a necessary incident to the exercise of judicial functions.—State ex rel. Metcalf v. District Court, 46.

## Statutory Provisions not Exclusive.

2. The enumeration of certain acts as contempts in section 7309, Revised Codes, is not exclusive.—State ex rel. Metcalf v. District Court, 46.

## Newspapers—Libelous Publication—Freedom of Press.

3. *Held*, on *certiorari*, that publication of an article in a newspaper in effect charging a district judge with wrongdoing in connection with his decision in a cause disposed of by him six months before, did not constitute contempt of court, under section 8275, Revised Codes, but fell within the constitutional provision guaranteeing the liberty of the press, for a violation of which privilege the law provides redress for libel by civil, or punishment by criminal, action.—State ex rel. Metcalf v. District Court, 46.

## CONTRACTS.

See, also, Negotiable Instruments; Rescission; Sales; Variance.

## Breach—Measure of Damages.

1. Where defendant had agreed to sell and deliver 300 head of cattle at a time certain, and delivered but 248, the buyer was entitled to recover as damages the advance in market value of the 52 cattle, sold but not delivered, over and above the contract price.—Pritchett v. Jenkins, 81.

## Attorneys—Contract of Employment—Compensation—Time of Payment.

2. Where attorneys were employed to foreclose a mortgage, the fee to be one-half of the amount recovered, they were entitled to their compensation only on the date their client's lien was on appeal finally determined to be superior to a claim to the property set up under a sheriff's deed.—Donovan v. Jenkins, 124.

## Same—Fees—Payment in Money.

3. Attorneys who agreed to foreclose a mortgage for "a sum equal to one-half of the net profit" plaintiff might recover were entitled to their compensation in money, and were not required to accept an interest in the property in lieu thereof.—Donovan v. Jenkins, 124.

## Same—Contract of Employment—Fee—"Costs and Charges"—Deduction.

4. *Held*, that a clause of the contract referred to above, which provided that before making division of the sum recovered, plaintiffs' client might deduct any "costs or charges" paid by her, included court costs only, and not taxes, repairs and the like.—Donovan v. Jenkins, 124.

## Same—Compensation—Deductions.

5. Rents collected by plaintiffs from tenants of the property pending foreclosure of the mortgage they were to secure under the contract above mentioned, were properly chargeable to them and deducted from their proportion of the amount recovered.—Donovan v. Jenkins, 124.

## Same—Contract of Employment—Construction.

6. Where a mortgagee in her contract of employment with a firm of attorneys reserved in herself the right to employ another attorney to assist in a foreclosure proceeding, with the understanding that, in the event she exercised her option, such attorney should receive one-half of the sum otherwise to be paid to the firm, and the attorney was employed,

the firm was entitled to only one-fourth of the recovery.—*Donovan v. Jenkins*, 124.

**Same—Stipulation—Special Damages.**

7. A stipulation in a contract for the payment of money permitting recovery of counsel fees in case action has to be brought to enforce collection is in the nature of a provision for special damages, recoverable, in addition to the principal sum claimed, upon appropriate allegation and proof.—*Bovee v. Helland*, 151.

**Offer and Acceptance.**

8. In order to form a contract, there must be an offer by one party and an unconditional acceptance of it by the other in accordance with its terms, and, if the acceptance falls within or goes beyond the terms of the offer, there is no contract.—*Glenn v. S. Birch & Sons Construction Co.*, 414.

**Sales—Offer—Unconditional Acceptance Necessary.**

9. Acceptance of an offer of sale of city bonds,—the negotiations being conducted through the medium of correspondence by telegrams and letters,—to which was attached a reservation, giving the buyer the right to examine the legality of the proceedings of the city council leading up to the issuance of the bonds before concluding the purchase, was not unconditional and absolute so as to bind the seller.—*Glenn v. S. Birch & Sons Construction Co.*, 415.

**Same—Buyer Substituting Third Person—Effect.**

10. Where an offer for the sale of city bonds has been made by the seller to A, the latter could not, by coupling with his acceptance a proposal that B should be substituted in his place as buyer, compel the seller to enter into contract relations with B, a stranger about whom he knew nothing, and the seller could rightfully withdraw his offer without incurring liability to A notwithstanding the latter then—but too late—proposed to assume the position of obligee and accept delivery of the bonds.—*Glenn v. S. Birch & Sons Construction Co.*, 415.

**Same—Confirmation of Sale—"Subject to Written Contract."**

11. Where a buyer of municipal bonds indicated in a telegram that he desired to enter into a written contract of sale, the seller's reply that he confirmed the sale "subject to written contract," construed as a reservation of the right to reject the formal writing if examination of it disclosed unacceptable terms.—*Glenn v. S. Birch & Sons Construction Co.*, 415.

## CONVERSION.

Insufficient complaint,—see *Pleading and Practice*, 12.

## CORPORATIONS.

**Injunction—Stockholder's Suit—Estoppel—Laches.**

1. A stockholder in a reservoir company, a corporation organized for profit, with power to sell its assets upon a proper vote, who, upon a sale having been made, took no timely steps to assail its legality (Rev. Codes, secs. 3899, 3900), nor brought suit until after the lapse of five years, was estopped by his delay, under the sections *supra*, from questioning the proceedings leading to the sale, and barred by either section 6449 or section 6451, Revised Codes, from prosecuting the action.—*Canyon Creek Irr. Dist. v. Martin*, 339.

**Same—Laches—Notice.**

2. Until plaintiff irrigation district had notice of defendant's diversions of its impounded waters, it could not be charged with permitting him to do so, and hence with laches in failing to institute action against him.—*Canyon Creek Irr. Dist. v. Martin*, 339.

## COSTS.

## Witnesses—Mileage.

1. The mileage of witnesses in civil actions allowed litigants by sections 7169 and 3182, Revised Codes, is limited to travel within the state.—*Chilcott v. Rea*, 134.

## Attorneys' Fees—Rules of Court.

2. *Quære*: May the district court make a rule allowing attorneys' fees as costs in cases where they are not expressly authorized by statute or stipulated for by the parties?—*Bovee v. Helland*, 151.

## Same—Stipulation—Special Damages.

3. A stipulation in a contract for the payment of money permitting recovery of counsel fees in case action has to be brought to enforce collection is in the nature of a provision for special damages, recoverable, in addition to the principal sum claimed, upon appropriate allegation and proof.—*Bovee v. Helland*, 151.

## Same—Statutory Provision Exclusive, When.

4. Since section 7169, Revised Codes, which declares what items may be recovered as costs in ordinary actions is exclusive except so far as certain cases are taken out of its operation by special statutes, and does not mention an attorney's fee as one of such items, it is not recoverable as costs independently of rule of court (assuming that such a rule may be promulgated) or stipulation of parties.—*Bovee v. Helland*, 151.

## Same—When Recoverable as Costs.

5. Where a promissory note expressly provided that "attorneys' fees in addition to other costs" might be recovered in the event of suit, the fees were by such stipulation taken out of the category of special damages assessable by a jury, and placed among costs recoverable in addition to those awarded by statute.—*Bovee v. Helland*, 151.

## On Appeal—Order of Supreme Court—District Courts—Jurisdiction.

6. Over an order made by the supreme court granting a new trial "at the costs of respondents," which became final upon issuance of the *remittitur*, the district court had no jurisdiction; hence a motion of respondents to tax costs was properly denied.—*In re Williams' Estate*, 366.

## Taxing Costs—Nonappealable Orders.

7. The costs incurred become a part of the judgment, and their disposition is reviewable only on an appeal from that judgment, and not from an order taxing or refusing to tax them.—*In re Williams' Estate*, 366.

## COUNTIES.

See, also, Workmen's Compensation, 1-4.

County seat election contest,—see Elections, 2-9.

## Mandamus—Assessable Property—Increase in—Evidence—Office and Officers.

1. By reason of an increase in the assessed valuation of property in a county it was raised from the sixth to the fifth class, whereby the office of county auditor came into existence. After relator had been elected to such office, the board of county commissioners refused to order salary warrants to issue to him, for the reason that because of alleged double assessments, clerical errors, etc., the assessed property value was below the amount required to justify the advancement of the county to the higher class. Evidence held to sustain the finding of the trial court that the county had sufficient assessable property to bring it into the fifth class, and that the issuance of a writ of mandate to the board was proper.—*State ex rel. Hauswald v. Ellis*, 505.



## COUNTY ATTORNEYS.

County seat election contest—Parties,—see Elections, 7.

Professional Misconduct—Disbarment.

1. A county attorney who used the powers of his office, by issuing warrants for the arrest of persons and filing informations against others, to compel them to make monetary settlements favorable to clients in his civil practice, was guilty of such misconduct as to warrant his disbarment.—In re Bunston, 83.

Removal—Appointment of Substitute—Power of District Court.

2. Proceedings for the removal of a public officer under section 9006, Revised Codes, being of a criminal nature, the district court is empowered by section 9309 to appoint some attorney in such a proceeding to perform the duties of the county attorney whenever the latter is absent on account of either neglect or sickness, or is disqualified for any reason.—State ex rel. McGrade v. District Court, 371.

Same—Statutes.

3. The power granted to the district court by section 9005, Revised Codes, in a proceeding looking to the removal of the county attorney, to appoint the county attorney of an adjoining county to act as prosecuting officer, may only be exercised when charges are preferred by a grand jury under section 8992.—State ex rel. McGrade v. District Court, 371.

Same—Compensation of Substitute for County Attorney.

4. An attorney appointed under section 9309, Revised Codes, to perform the duties of a county attorney in a proceeding in which the latter was sought to be removed upon the accusation of a taxpayer charging neglect of duty, may not demand or receive compensation for his services out of the county treasury, the statute not making any provision therefor, and the county not being liable as upon an implied contract to pay what the services are reasonably worth.—State ex rel. McGrade v. District Court, 371.

Same.

5. A county attorney called into an adjoining county by appointment under section 9005, Revised Codes, to act as prosecuting officer in a proceeding of the nature of that referred to in paragraph 4, *supra*, is not entitled to compensation for services thus rendered.—State ex rel. McGrade v. District Court, 371.

Criminal Law—Witnesses—Subpoenas—Mandamus.

6. Since subdivision 3 of section 9486, Revised Codes, lodges the power in the county attorney to issue subpoenas for the attendance of witnesses in criminal cases, and the writ does not lie where another adequate remedy exists, *mandamus* will not issue at his instance to compel a district judge to make an order authorizing the clerk of the court to do what relator himself may do.—State ex rel. Wolfe v. District Court, 556.

## COUNTY COMMISSIONERS.

Parties to county seat election contest,—see Elections, 8.

## CRIMINAL LAW.

Power to issue subpoena,—see County Attorneys, 6.

Rape—Information—Sufficiency.

1. Failure to charge an assault in an information for rape on a female under the age of consent, and that prosecutrix was a human being, did not render the pleading insufficient.—State v. Keeler, 205.

**Same—Evidence of Other Like Offenses—Admissibility.**

2. Evidence of acts of intercourse between defendant and prosecutrix occurring within six weeks after the act relied on by the state for conviction under an information for rape, was admissible.—*State v. Keeler*, 205.

**Same—Trial—Remarks by Judge—Discretion.**

3. Remarks made by the trial judge during the progress of a criminal trial which did not show an abuse of his discretionary power and duty to see that the witnesses were protected from misrepresentations by attorneys, that their testimony could be understood and the trial conducted with reasonable expedition, were not ground for reversal of the judgment of conviction.—*State v. Keeler*, 205.

**Same—Precautionary Instruction—When Refused not Error.**

4. An offered instruction that rape cases are prosecutions attended with great danger, and afford an opportunity for the display of malice and private vengeance, such charges being easily invented and maintained, and that the jury should hesitate to convict solely on the testimony of the prosecutrix, was properly refused, where there was nothing in the record to indicate that the prosecution was instituted through malice or for private vengeance, and another instruction sufficiently covering the subject had been given.—*State v. Keeler*, 205.

**Same—Trial—Exclusion of Public—Constitution—Reversal of Judgment.**

5. In a prosecution for rape, the court made an order that on account of the nature of the case no one should be allowed in the courtroom in addition to those then present, and those present, after once leaving, could not return, court officers, doctors, attorneys and newspapermen being excluded from the order. *Held* that by an enforcement of the order the defendant was denied the right to a public trial guaranteed by section 16, Article III, of the Constitution, to one charged with crime. (MR. JUSTICE SANNER dissenting.)—*State v. Keeler*, 205.

**Same—Denial of Public Trial—Prejudice—Presumption.**

6. Where one accused of crime shows that he was denied a public trial contrary to the provision of section 16, Article III, of the Constitution, the law imputes prejudice.—*State v. Keeler*, 205.

**Gaming—Possession of Implements—Faro—Evidence—Sufficiency.**

7. Evidence showing that defendant had in his possession or control a faro lay-out contrary to section 8417, Revised Codes, *held* sufficient to warrant conviction, proof that he also had a dealer's box—without which the game of faro cannot be played—not being necessary to complete the offense.—*State v. Williams*, 369.

**Unfair Discrimination—Buying Commodities—Evidence—Insufficiency.**

8. Evidence in a prosecution for unfair discrimination in buying wheat, contrary to the provisions of Chapter 8, Laws of 1913, *held* insufficient for a conviction of defendant; the court's order in directing a verdict of acquittal was therefore correct.—*State v. Rocky Mt. Elevator Co.*, 487.

**Exceptions—Review—Statutes.**

9. *Held*, that Chapter 135, Laws of 1915, dispensing with the necessity of formal exceptions, governs the procedure in civil—not criminal—causes.—*State v. Lewis*, 495.

**Homicide—Instructions—"Assault"—Definition.**

10. Where the court in its instructions had used the words "assailant" and "assaulted," on a trial for murder in the first degree, refusal to submit an instruction defining the term "assault" was harmless, inasmuch as its meaning must be regarded as understood by the average juror without specific definition.—*State v. Lewis*, 495.

Same.

11. Where under the evidence the defendant was either guilty of unlawful homicide or not guilty at all, refusal to give an instruction defining the lesser offense of assault was proper.—*State v. Lewis*, 495.

Same—Instructions—"Reasonable Doubt"—Definition.

12. An instruction that a reasonable doubt is a doubt founded on reason and not one arising from mere caprice or groundless conjecture, though not in the words of the one approved in *Territory v. McAndrews*, 3 Mont. 158, was not open to objection.—*State v. Lewis*, 495.

Same.

13. After the trial court has fully stated to the jury in the instructions the presumptions of which the law gives the defendant charged with crime the benefit, it is sufficient if they are told that they must acquit him unless they are satisfied of his guilt beyond a reasonable doubt, without further definition of that term.—*State v. Lewis*, 495.

Same—Instructions—What are not.

14. Directions to the jury as to their conduct in the jury-room and as to the form in which they may return their verdict are not instructions on the law of the case, which must be in writing; hence they may be given orally.—*State v. Lewis*, 495.

Defective Information — Dismissal — Filing New Information — Habeas Corpus.

15. Where an information was dismissed on the motion of the county attorney because of the omission of a material allegation therefrom, and a new information ordered filed by the court, the absence of a statement from the minutes of the court that before making the order it entertained the opinion that the objection to the original information could be avoided in the new one,—an entry which might properly have been made but was not required to be made by section 9204, Revised Codes,—was not sufficient ground for the release of the complainant from custody on *habeas corpus*.—*In re Palm*, 558.

Hearsay Evidence—Harmless Error.

16. Evidence wholly immaterial and which could not possibly have prejudiced defendant, was not alone sufficient to work a reversal of the judgment of guilty of a misdemeanor, though erroneously admitted under the hearsay rule.—*State v. Russell*, 583.

Violation of Fish and Game Law—Evidence—Sufficiency.

17. Evidence held sufficient to warrant the conviction of defendant charged with taking fish from a stream unlawfully.—*State v. Russell*, 583.

## CROPS.

See Mortgages, 5-8.

## DAMAGES.

Measure of, breach of contract,—see Contracts, 1.

Punitive—Harmless error in instructions,—see False Imprisonment, 2.

Special—Attorneys' fees recoverable as when,—see Costs, 3.

Mitigation of—Limit of Rule.

1. While an injured person must use ordinary diligence to effect a cure and thus to minimize the damages, he is not required, after one unsuccessful operation, to undergo another and major operation, risking failure in that as well, in order to bring about that result.—*Freeman v. Chicago, M. & St. P. Ry. Co.*, 1.

Tort of Agent—Punitive Damages—Liability of Principal.

2. A telegraph company may be made to respond in punitive damages for its agent's misconduct, even though the wrongful act was unauthorized and not ratified by it.—*Lahood v. Continental Telegraph Co.*, 313.

Telegrams—Fraudulent Delay—Punitive Damages—Statutes.

3. Where the element of fraud entered into the wrongdoing of a telegraph operator in withholding messages to and from a customer of his company, thus enabling him to profit by it, the provisions of section 6047, Revised Codes, awarding the right to punitive damages, governed, and section 5363, which allows the injured person \$50 in addition to his actual damages, did not.—*Lahood v. Continental Telegraph Co.*, 313.

#### DEATH.

Actions for damages,—see Personal Injuries, 9-17, 29-31.

#### DECLARATIONS.

Of agent,—see Evidence, 9, 10.

#### DEEDS.

Appurtenances,—see Waters and Water Rights, 6-8.

Deed Absolute—Action to have declared mortgage,—see Mortgages, 14-17.

Lost,—see Waters and Water Rights, 1.

Unrecorded,—Constructive notice,—see Waters and Water Rights, 3-5.

#### DEEDS OF TRUST.

See Mortgages, 9-13.

#### DEFAULT JUDGMENTS.

See Judgments, 2, 5-7.

#### DEMURRER.

See Pleading and Practice, 6, 7.

#### DISBARMENT.

See Attorneys.

#### DISCRETION.

See, also, Mandamus, 3, 5.

Granting or refusing retail liquor license,—see Intoxicating Liquors, 3.

Trial—Reading Court Opinion.

1. Failure to excuse the jury while counsel, during the examination of a witness and over objection, read from the opinion of another court in another case, was not reversible error, in the absence of a showing of abuse of its discretion.—*In re Williams' Estate*, 192.

Same—Remarks by Judge.

2. Remarks made by the trial judge during the progress of a criminal trial which did not show an abuse of his discretionary power and duty to see that the witnesses were protected from misrepresentations by attorneys, that their testimony could be understood and the trial conducted with reasonable expedition, were not ground for reversal of the judgment of conviction.—*State v. Keeler*, 205.

## DISMISSAL.

Of defective information—Filing of new information,—see Criminal Law, 15.

## DISTRICT COURTS.

See, also, Contempt.

Jurisdiction in county seat election contest,—see Elections, 2.

Power to appoint substitute for county attorney,—see County Attorneys, 2-5.

Taxing costs,—see Costs, 6, 7.

*Habeas Corpus*—Disqualification of District Judge—Imputed Bias and Prejudice.

1. *Habeas corpus* seeking the release of an incompetent from the custody of her guardian on the ground that she was competent and illegally restrained of her liberty, is a proceeding civil in its nature; hence, the guardian had the right to disqualify the judge who issued the writ, for imputed bias and prejudice, under amended section 6315, Revised Codes (Chap. 161, Laws 1909).—State ex rel. Brandegee v. Clements, 57.

Substituted Judges—Powers at Chambers—Judgment on Pleadings.

2. A district judge was invited to another district to hear and determine an action to quiet title in which the resident judge had been disqualified. Though accepting the invitation, he never went into the county to which he had been called to assume jurisdiction, but at chambers in his own county sustained a motion for judgment on the pleadings. *Held*, that the judgment so rendered was made without jurisdiction, since his powers at chambers, whether acting on matters affecting his own or another district, are limited to the disposition of proceedings enumerated in section 6314, Revised Codes, of which a disposition of a cause on the merits is not one.—Eustance v. Francis, 295.

Powers of Court—Powers of Judges.

3. A motion for judgment on the pleadings, a demurrer, a motion to strike, or the like, invokes the power of the court, not of the judge, and must be tried and determined by the court, and not by the judge. Eustance v. Francis, 295.

Authority of Substitute Judges—"Hold Court."

4. To "hold court," within the meaning of the Constitution, Article VIII, section 12, authorizing one district judge to hold court for another, is to hold court in the district just as does the local judge, and not to sit in chambers in another district.—Eustance v. Francis, 295.

Injunction—Taxpayer's Suit—Jurisdiction.

5. The district court had jurisdiction to hear, and a citizen and taxpayer could maintain, a suit to enjoin the state treasurer from issuing, negotiating or selling bonds pursuant to the provisions of the Farm Loan Act (Chap. 28, Laws 1915).—Hill v. Rac, 378.

Quiating Title—Injunction—Equity—Jurisdiction.

6. The district court had jurisdiction, under its equity powers, of a suit to quiet title to, and for an injunction against removing, a school building.—Hauf v. School Dist. No. 1, 395.

Fair Trial Law—Disqualification—Change of Venue—When Order Void.

7. Under section 6315, as amended (Laws 1909, Chap. 114), a change of venue should not be ordered by a disqualified judge until after endeavor to secure another judge has failed, and then only pursuant to the provision of sections 6506 and 6507; hence an order of a district judge transferring a cause to another county, after an affidavit of disqualification had been filed against him, without observing the statutory requirements, was in excess of jurisdiction and void.—State ex rel. Sell v. District Court, 457.

## DIVORCE.

## Jury Trial.

1. *Held*, that since the right to a trial of a contested divorce suit did not exist at the time the Constitution was adopted, a party to such a suit may not now demand, as a matter of right, a jury trial of the issues raised by the pleadings.—*Davidson v. Davidson*, 441.

## DOWER.

See Husband and Wife, 1; Trusts, 4.

## ELECTIONS.

Primary Elections—Time for Holding—*Mandamus*.

1. *Held*, on *mandamus*, that initiated law providing for a primary election of candidates for delegates to national party conventions and for the nomination of presidential electors by direct vote (Laws 1913, p. 590), to be held on the forty-fifth day before the first Monday in June in presidential years, and the law, likewise initiated (Laws 1913, p. 570), making provision for a similar election for the purpose of making party nominations of state and county officers to be held on the seventieth day preceding the biennial general elections, may not be construed so as to permit the holding of but one election for both purposes.—*State ex rel. Taylor v. Duncan*, 69.

## County Seat Elections—Jurisdiction.

2. In the absence of statutory provision authorizing a "contest" of a county seat election alleged to have been the result of fraud and corrupt practices, and *quo warranto* not being available, the district court has jurisdiction under its equity powers to hear and determine such a matter, until such time as the law shall provide the procedure.—*Poe v. Sheridan County*, 279.

## Same—Plaintiff—Capacity to Sue—Demurrer.

3. Want of authority in a taxpayer to maintain a proceeding of the kind referred to above forms no ground of special demurrer, and has nothing to do with lack of "legal capacity to sue," mentioned in subdivision 2 of section 6534, Revised Codes, meaning that plaintiff shall be free from such general disability, as infancy or insanity, which must appear on the face of the complaint to make the pleading demurrable. *Poe v. Sheridan County*, 279.

## Same—Defect of Parties—Demurrer.

4. Under section 6535, Revised Codes, a demurrer for defect of parties must point out the particulars relied on, showing the absence of necessary, as distinguished from merely proper, parties.—*Poe v. Sheridan County*, 279.

## Same—Who may Sue.

5. Any citizen, who is also an elector and taxpayer, may be the party plaintiff in a proceeding to determine the validity of a county seat election.—*Poe v. Sheridan County*, 279.

## Same—Duties of Attorney General—Parties.

6. It is not one of the duties of the attorney general of the state to prosecute an inquiry into alleged fraudulent and corrupt practices at a county seat election; hence a demurrer to the complaint in such a proceeding for defect of parties plaintiff, because of his absence, was improperly sustained.—*Poe v. Sheridan County*, 279.

## Same—County Attorney—Parties.

7. The county attorney of the county referred to above, himself made one of the defendants, and as the legal adviser of his codefendant county commissioner, was not a proper party plaintiff in the proceed-

ing, and a demurrer for defect of parties because he had not been joined with plaintiff did not lie.—*Poe v. Sheridan County*, 279.

**Same—County Commissioners—Parties.**

8. Inasmuch as the co-operation of the commissioners of a county, the seat of government of which was claimed to have been illegally located, was necessary to a complete adjudication of the matter, they were properly made parties defendant, even though innocent of any wrongdoing.—*Poe v. Sheridan County*, 279.

**Same—Laches—What does not Constitute.**

9. A suit to test the legality of a county seat election, brought fourteen weeks after the result was declared and fifteen weeks after the election had taken place, was not barred by laches.—*Poe v. Sheridan County*, 279.

### EMINENT DOMAIN.

**Trial Practice—Right to Open and Close.**

1. *Quære*: Has the owner of land sought to be condemned the right to open and close on the question of damages?—*Interstate P. Co. v. Anaconda C. Min. Co.*, 509.

**Complaint—Description of Land—Sufficiency.**

2. Complaint in a condemnation suit which described the land by metes and bounds on three sides, and on the fourth merely designated a navigable river as the boundary, without stating that by the latter description the high or low water mark was meant, *held* sufficient to meet the requirement of section 4529, Revised Codes.—*Interstate P. Co. v. Anaconda C. Min. Co.*, 509.

**Same—Area of Land.**

3. Under section 7337, Revised Codes, the area of the land sought to be acquired by condemnation proceedings is not required to be stated in the petition.—*Interstate P. Co. v. Anaconda C. Min. Co.*, 509.

**Same—Unnecessary Allegations.**

4. Where plaintiff electric power company in a condemnation proceeding alleged sufficient facts to show that the use sought to be made of the land was a public one, it was not necessary to specifically allege that there was a present or prospective demand for its products.—*Interstate P. Co. v. Anaconda C. Min. Co.*, 509.

**Evidence—Immateriality.**

5. Evidence as to the practicability of plaintiff's power plant and the method of its installation, *held* properly excluded as having no bearing on the question at issue—the amount of damages recoverable by defendants.—*Interstate P. Co. v. Anaconda C. Min. Co.*, 509.

**Verdict—When Conclusive.**

6. A verdict in a condemnation suit which was based upon a substantial conflict in the evidence and was well within the extremes fixed by the different witnesses, and which was approved by the trial court in denying appellants' motion for a new trial, will be accepted as conclusive on appeal.—*Interstate P. Co. v. Anaconda C. Min. Co.*, 509.

### ESTOPPEL.

See, also, Mortgages, 16, 17; Rescission, 1.

**Corporations—Injunction—Stockholder's Suit—Laches.**

1. A stockholder in a reservoir company, a corporation organized for profit, with power to sell its assets upon a proper vote, who, upon a sale having been made, took no timely steps to assail its legality (Rev. Codes, secs. 3899, 3900), nor brought suit until after the lapse of five years, was estopped by his delay, under the sections *supra*, from questioning the proceedings leading to the sale, and barred by either sec-

tion 6449 or section 6451, Revised Codes, from prosecuting the action. *Canyon Creek Irr. Co. v. Martin*, 339.

**Special Improvement Districts—Creation—Estoppel by Joining in Petition.**

2. Where an owner joined in a petition for the creation of a special improvement district, and thereafter in creating it a large part of the property described therein was excluded by the city council, the petitioner was not estopped to subsequently attack the validity of its creation by the fact that he joined in the petition.—*City of Lewistown v. Warren*, 356.

**Same—Payment of Installment of Tax.**

3. To estop a taxpayer from attacking the validity of the creation of a special improvement district by payment of an installment of the tax, the payment must have been voluntarily made.—*City of Lewistown v. Warren*, 356.

**Same—Payment of Installment of Tax—Prejudice.**

4. Defendant city could not have been prejudiced by the payment of an installment of a special improvement tax, which, being invalid, it was not entitled to collect, and was therefore not in position to claim an estoppel.—*City of Lewistown v. Warren*, 356.

**Water Rights—Abandonment.**

5. To uphold S.'s contention that P., the owner of a water right, was estopped to claim the right or to say that there was no intention on her part to abandon it, some representations must have been made or some position assumed by the latter upon which the former, having a right to do so, relied in good faith, and from which inequitable consequences must flow if the representations be repudiated or the position be changed.—*Moore v. Sherman*, 542.

**Same—Estoppel by Silence.**

6. Before silence alone can work an estoppel, the person to be estopped must have had an intent to mislead or a willingness that another should be deceived, and the latter must have been misled by the silence. *Moore v. Sherman*, 542.

**Same.**

7. Where no legal obligation rested upon a prior appropriator to make known his claim to a water right which he did not use, an estoppel cannot be claimed by a subsequent appropriator, even though he was injured by the recognition of the former right.—*Moore v. Sherman*, 542.

**EVIDENCE.**

**Admission of immaterial hearsay evidence—Harmless error,—see Criminal Law, 16.**

**Written Contracts—Parol Evidence—When Inadmissible.**

1. Admission of parol evidence to vary and contradict the terms of a written contract is error.—*Pritchett v. Jenkins*, 81.

**Nurses—Character of Applicant.**

2. Testimony touching the immoral character of the applicant, introduced at a divorce proceeding to which she was a party, could rightfully be taken into consideration by the board of examiners of nurses in passing upon the question of her character.—*State ex rel. Scollard v. Board of Examiners*, 91.

**Promissory Notes—Mistake in Execution—Admissibility.**

3. Evidence by plaintiff that a note sued on was inadvertently dated "1904" instead of "1905" because, it being at the beginning of the new year, he had not yet become accustomed to writing the new date, was admissible, where the answer was insufficient to tender issue as to an intentional material alteration by plaintiff.—*McDonald v. Klenze*, 142.



**Same—Compromise—Tender of Payment—Admissibility.**

4. It is not error to admit evidence, in a suit on a note, that defendant offered, after suit was brought, to pay same by transfer of stocks and bonds, where it was not clear whether the offer was intended as a compromise or tender of payment, and the court instructed the jury to determine what defendant's purpose was in making the offer, and directed them to disregard the evidence if they reached the conclusion that the offer was intended as a compromise by defendant for the purpose of buying his peace.—*McDonald v. Klenze*, 142.

**Witnesses—Impeachment—Rebuttal.**

5. Where the character of a witness whose deposition had been introduced was attacked by a deposition showing that at the time of the trial he was confined in a penitentiary, evidence of his previous good character was admissible in rebuttal.—*In re Williams' Estate*, 192.

**Wills—Contest—Wealth of Beneficiary—Admissibility.**

6. Evidence of the great wealth of the principal beneficiary under a will attacked for incapacity of the testatrix and undue influence, was admissible as tending to show an unnatural disposition of her property, it appearing that by it she practically disinherited her grandchild, who was her only near blood relation and for whom she had always manifested the greatest affection.—*In re Williams' Estate*, 192.

**Rape—Evidence of Other Like Offenses—Admissibility.**

7. Evidence of acts of intercourse between defendant and prosecutrix occurring within six weeks after the act relied on by the state for conviction under an information for rape, was admissible.—*State v. Keeler*, 205.

**Slander—Punitive Damages—Wealth of Defendant.**

8. The wealth and social standing of defendant charged with slander may be looked to by the jury in determining the punitive damages to be assessed.—*Fowlie v. Cruse*, 222.

**Principal and Agent—Declarations—Admissibility.**

9. Declarations of the agent relating to the business for which he is employed, and explanatory of his acts, when proceeding within the scope of his authority, are deemed to be the declarations of the principal, and are competent evidence to bind the latter; otherwise not.—*Fowlie v. Cruse*, 222.

**Same—Detectives—Declarations of Agent—Inadmissibility.**

10. Defendant in an action for slander had employed detectives to obtain information relative to the whereabouts of articles of jewelry thought by him to have been stolen by plaintiff, a hotel-keeper. They, in conversations with plaintiff, repeated defendant's words in effect charging the former with theft. Plaintiff was permitted to testify to these declarations. *Held* prejudicial error, under the rule *supra*.—*Fowlie v. Cruse*, 222.

**Damages—Proper Rebuttal.**

11. Plaintiff, a hotel-keeper, having introduced evidence to the effect that after the alleged slander, her daily income from her business had decreased substantially, it was error to deny defendant the right to show in rebuttal that during the same time the business of other hotels of the same class likewise declined, as tending to establish that the loss suffered by plaintiff was properly attributable to causes foreign to the alleged wrong.—*Fowlie v. Cruse*, 222.

**Same—Privileged Communications—Waiver.**

12. By making the slanderous statement in the presence of a stranger, defendant removed the bar of privilege otherwise attending communications made by him to his agents only, which might have protected him, in the absence of actual malice. (Rev. Codes, sec. 3604.)—*Fowlie v. Cruse*, 222.

**Trespass—Title—When Record Evidence Required.**

13. The rule that in an action for trespass on land plaintiff must, in order to prevail, tender record proof of title, applies only to cases in which he is not in actual possession, but is compelled to rely upon constructive possession under his record title.—*Coburn Cattle Co. v. Hensen*, 252.

**Real Property—Deed Absolute—Mortgage—Evidence—Insufficiency.**

14. In an action to have a deed absolute declared a mortgage, evidence held insufficient to meet the requirement of the rule under which the proof must be clear and convincing to warrant relief.—*Harrington v. Butte & Superior C. Co., Ltd.*, 263.

**Damages—Earning Capacity—Evidence—Technical Error.**

15. The admission of evidence as to the usual charges made by Christian Science practitioners, in the absence of a showing that deceased was accustomed to make such charges, was technical error.—*Lewis v. Steele*, 300.

**Automobile—Excessive Speed—Evidence—Admissibility.**

16. Testimony of one of the occupants of an automobile at the time of the accident, that the appearance of deceased was so sudden that it could not have been stopped in time to avoid striking her, even if its speed had not exceeded four miles an hour, was admissible as tending to show that the accident was not due to excessive speed.—*Lewis v. Steele*, 300.

**Same—Street Accident—Evidence—Admissibility.**

17. It was proper for defendant to show that, when first seen by the occupants of the automobile, the decedent's actions were such as to create the impression that she was waiting for a car, and was not about to cross a street intersection.—*Lewis v. Steele*, 300.

**Same—Evidence—Avoiding Effect of Other Evidence—Admissibility.**

18. It having been shown that after the accident the machine proceeded to the dance to which defendant's sons and their guests were going, and that defendant's son who drove the car there danced several times, evidence that his other son had inquired at decedent's house and was informed that her injury was not serious was admissible to avoid the prejudice which might arise from the imputation of heartlessness or undue haste.—*Lewis v. Steele*, 300.

**Hypothetical Questions—Procedure.**

19. In putting a hypothetical question to a witness, counsel may assume as established all the facts in evidence tending directly or by fair inference to establish his theory of the case, and need not include all the evidence on the subject, opposing counsel having the privilege of including such matters as he deems improperly omitted, in questions propounded by himself; whereupon it is the province of the jury to say whether the facts assumed by the questions were established and whether the opinion based on them has any probative value.—*De Sandro v. Missoula L. & W. Co.*, 333.

**Personal Injuries—Expert Witnesses—Who may be.**

20. In an action to recover damages sustained by the caving in of a ditch while plaintiff was at work, laborers who had experience in digging trenches for gas and water pipe and in excavating for buildings could properly testify as experts as to where in the ditch, in their opinion, the fall of earth first began.—*De Sandro v. Missoula L. & W. Co.*, 333.

**Same—Minimizing Damages—Cost of Operation—Evidence—Admissibility.**

21. Evidence of the cost of an operation that would minimize plaintiff's suffering due to a vicious union of a broken leg, at the time of the trial, was admissible in an action against the physician for damages. (MR. CHIEF JUSTICE BRANTLY dissenting.)—*Stokes v. Long*, 470.

**X-ray Plates—Evidence—Admissibility.**

22. X-ray plates—like photographs—if testified to as correct, are competent evidence to prove a condition which can be shown by such a representation; hence such plates showing the condition of plaintiff's leg at time of trial, were competent, they having been taken by practicing physicians who showed that they understood and were accustomed to the use of the X-ray process in their practice, and possessed the required skill and knowledge to use it with accurate results.—*Stokes v. Long*, 470.

**Documentary Evidence—Value—Review.**

23. Where a proceeding in *mandamus* was submitted to the district court wholly upon documentary evidence, the supreme court may on appeal as readily determine its value as could the trial court.—*State ex rel. Hauswald v. Ellis*, 505.

**EXCEPTIONS.**

Necessity of interposing,—see *Pleading and Practice*, 17.

**EXPERT WITNESSES.**

See *Evidence*, 20.

**FAIR TRIAL LAW.**

See *District Courts*.

**FALSE IMPRISONMENT.****Complaint—Sufficiency.**

1. A complaint in an action for false imprisonment, alleging a violation of plaintiff's personal liberty and that such violation was without legal justification, was sufficient on attack by general demurrer.—*Slifer v. Yorath*, 129.

**Punitive Damages—Instructions—Refusal—Harmless Error.**

2. Where no evidence tending to show malice on the part of a police officer in arresting plaintiff had been introduced, and the jury—judging from the amount of the verdict—must have refused to award exemplary damages, error in submitting instructions on the subject of punitive damages held harmless.—*Slifer v. Yorath*, 129.

**Burden of Proof.**

3. In an action for false imprisonment, the burden of proving justification for the arrest of the plaintiff by defendant police officer was upon the latter after the former had made out a *prima facie* case by testifying that while peaceably on his way home he was arrested without explanation or charge.—*Slifer v. Yorath*, 129.

**FARM LOANS.****Constitution—Equal Protection of the Laws.**

1. Held, that the Farm Loan Act (Chap. 28, Laws 1915), in selecting the agricultural interests of the state as the beneficiary of its provisions to the exclusion of others, and in discriminating in favor of such farmers only who are able to offer a certain kind of security, thus excluding all those who have less desirable or no security at all, is not unconstitutional as denying the equal protection of the laws.—*Hill v. Rae*, 378.

**Appropriations—Separate Bills.**

2. Where an appropriation is a mere incident to a larger, but single, subject of legislation—such as the creation of a Farm Loan Commission under Chapter 28, Laws of 1915, and providing funds for its

inauguration and conduct—it need not be made by separate bill as otherwise required by section 33, Article V, of the Constitution.—*Hill v. Rae*, 378.

**Lending Credit of State—Constitution.**

3. *Held*, that the provision of Chapter 28, Laws of 1915, appropriating \$20,000 to serve as a guaranty fund to assure prompt payment of interest on farm loan bonds, is void under section 35 of Article V of the Constitution, because the funds thus appropriated are “not under the absolute control of the state,” and under section 1, Article XIII, because by it the credit of the state is given as an assurance for the benefit of those who may become lenders under the Act.—*Hill v. Rae*, 378.

**Fees—Exemptions—Power of State.**

4. The state could properly exempt itself or its officers from the payment of recording fees on mortgages given under the Farm Loan Act.—*Hill v. Rae*, 378.

**Exemptions—Equal Protection of Laws.**

5. Inasmuch as the exemption from payment of fee for recording the mortgage placed upon his land for a loan obtained under the Farm Loan Act is not for the benefit of the farmer—the borrower—but for that of the lender—the real mortgagee—the discrimination between the latter and all other mortgagees *held* to vitiate the Act so far as the exemption is concerned, under the equal protection of the law clause of the Constitution.—*Hill v. Rae*, 378.

**FEEES.**

Attorneys' fees,—see Attorneys.

Mortgage recordation fee,—see Mortgages, 18, 19.

**FENCES.**

See Animals, 1-3.

**FINDINGS.**

**Wills—Inconsistency of Findings.**

1. A finding of want of testamentary capacity is not so far inconsistent with one of undue influence that both may not stand.—*In re Williams' Estate*, 192.

**Appeal and Error—Burden on Appellant.**

2. Where the probate of a will was attacked on the grounds of want of publication, incapacity of the testatrix and undue influence, and a decree rendered based on findings sustaining all such grounds, appellants had the burden of showing that all the findings were erroneous, since the correctness of any one of them was sufficient to sustain the decree.—*In re Williams' Estate*, 192.

**FIRE MARSHAL.**

Power to destroy private property,—see Cities and Towns, 9.

**FISH AND GAME.**

Violation of act—Evidence—Sufficiency,—see Criminal Law, 17.

**FIXTURES.**

**What Constitutes.**

1. In the absence of anything showing an intention to the contrary, things affixed to realty—such as buildings resting upon foundations

imbedded in the soil—are part of the realty and pass with it; hence ownership of such a structure necessarily followed ownership of the land rightfully decreed to plaintiff.—*Hauf v. School Dist. No. 1*, 395.

## FRAUD.

By agent in assignment of mortgage,—see Mortgages, 26, 29.  
 Evidence of unintentional mistake—Pleading,—see Evidence, 3.  
 In sale of state lands,—see State Lands, 4-6.  
 Pleading,—see Pleading and Practice, 2.  
 Setting aside judgment for,—see Judgments, 2-4.

## GAMING.

See Criminal Law, 7.

## GOVERNOR.

State Lands—Certificate of Purchase—Duty of Governor—*Mandamus*.

1. *Mandamus* lies to compel the governor, as president of the state board of land commissioners, to sign a certificate of purchase of state lands, his duty in this respect being a purely ministerial one.—*State ex rel. Danaher v. Miller*, 562.

## Powers.

2. The Constitution and laws of the state are the charters of the governor's powers, and in them he must find the authority for his official acts.—*Herlihy v. Donohue*, 601.

## HABEAS CORPUS.

See, also, Juvenile Delinquents, 3.

Disqualification of District Judge—Imputed Bias and Prejudice.

1. *Habeas corpus* seeking the release of an incompetent from the custody of her guardian on the ground that she was competent and illegally restrained of her liberty, is a proceeding civil in its nature; hence, the guardian had the right to disqualify the judge who issued the writ, for imputed bias and prejudice, under amended section 6315, Revised Codes (Chap. 161, Laws 1909).—*State ex rel. Brandegee v. Clements*, 57.

## Impairing Efficacy of Writ.

2. Inasmuch as the writ of *habeas corpus* is a highly prerogative one and the disposition of the proceeding is not directly subject to review, the conclusion that the right to disqualify the district judge for imputed bias and prejudice may be exercised in such a proceeding, does not impair, but rather increases, the efficacy of the writ.—*State ex rel. Brandegee v. Clements*, 57.

Prohibition—When Issuance of Writ not Premature.

3. Where the allegations of relator's affidavit that an affidavit of disqualification for imputed bias and prejudice had been filed in time, that the district judge paid no attention to it and intended to hear and dispose of a *habeas corpus* proceeding the day after the issuance of the writ, were admitted by a motion to quash, the issuance of a writ of prohibition was not premature.—*State ex rel. Brandegee v. Clements*, 57.

Writ Does not Lie, When.

4. Where the jury found the defendant guilty of assault in the first degree, and, in an endeavor to exercise the discretion vested in them by the Indeterminate Sentence Law (Laws 1915, p. 21), fixed his punishment "at not less than — years nor more than ten years" in the state prison, and the judge in pronouncing sentence assessed the pun-

ishment at not less than ten nor more than twenty years, instead of requiring the jury to again retire and supply the omission in their verdict, the writ of *habeas corpus* did not lie.—In re Gomez, 189.

**Office of Writ.**

5. The office of the writ of *habeas corpus* is not that of an appeal or writ of error to review irregularities in the verdict or judgment.—In re Gomez, 189.

**Defective Information—Dismissal—Filing New Information.**

6. Where an information was dismissed on the motion of the county attorney because of the omission of a material allegation therefrom, and a new information ordered filed by the court, the absence of a statement from the minutes of the court that before making the order it entertained the opinion that the objection to the original information could be avoided in the new one,—an entry which might properly have been made but was not required to be made by section 9204, Revised Codes,—was not sufficient ground for the release of the complainant from custody on *habeas corpus*.—In re Palm, 558.

**HARMLESS ERROR.**

See Appeal and Error, 1, 3, 5, 17, 23.

Admission of immaterial hearsay evidence,—see Criminal Law, 16.

**HOMICIDE.**

See Criminal Law, 10-14.

**HUSBAND AND WIFE.**

Breach of trust,—see Trusts, 1-4.

One as agent of the other—Fraud—Ratification,—see State Lands, 5.

Dower—Trust Property.

1. Generally speaking, a wife has no dower in trust property or in estates lost by breach of condition.—Huffine v. Lincoln, 585.

**HYPOTHETICAL QUESTIONS.**

See Evidence, 19.

**INDUSTRIAL ACCIDENT BOARD.**

See Workmen's Compensation, 1-5.

**INFORMATIONS.**

Dismissal for insufficiency,—see Criminal Law, 15.

Sufficiency in prosecution for rape,—see Criminal Law, 1.

**INJUNCTION.**

See, also, Corporations; Mines and Mining, 1; Quieting Title, 1, 2.

Cities and Towns—Lies, When.

1. Injunction *held* to be a remedy available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city.—Sharkey v. City of Butte, 16.

Taxpayer's Suit—District Court—Jurisdiction.

2. The district court had jurisdiction to hear, and a citizen and taxpayer could maintain, a suit to enjoin the state treasurer from issuing, negotiating or selling bonds pursuant to the provisions of the Farm Loan Act (Chap. 28, Laws 1915).—Hill v. Rae, 378.

## INSTRUCTIONS.

**Credibility of Witnesses.**

1. Reversal of a judgment will not be ordered for refusal of special instructions on the credibility of witnesses where a general one covering the subject had been given, and appellant did not point out wherein he was prejudiced by the refusal.—*Slifer v. Yorath*, 129.

**Requested Instruction—Refusal, When not Error.**

2. Refusal of a requested instruction is not error where another covering the same matter is given.—*Chilcott v. Rea*, 134.

**Rape—Precautionary Instruction—When Refused not Error.**

3. An offered instruction that rape cases are prosecutions attended with great danger, and afford an opportunity for the display of malice and private vengeance, such charges being easily invented and maintained, and that the jury should hesitate to convict solely on the testimony of the prosecutrix, was properly refused, where there was nothing in the record to indicate that the prosecution was instituted through malice or for private vengeance, and another instruction sufficiently covering the subject had been given.—*State v. Keeler*, 205.

**Slander.**

4. Instruction to the jury that in order to find for plaintiff the proof must show that defendant uttered the words made the basis of an action for slander, or "substantially similar words," *held* not prejudicially erroneous.—*Fowlie v. Cruse*, 222.

**Technical Terms—Proper Rule.**

5. In formulating instructions, courts should employ terms and expressions which have been approved generally as technically correct.—*Fowlie v. Cruse*, 222.

**Good Character—Presumptions.**

6. An instruction that, in the absence of evidence to the contrary, the law presumes that the plaintiff in an action for slander possesses a good reputation, *held* proper under section 8026, Revised Codes.—*Fowlie v. Cruse*, 222.

**Personal Injuries—Liability of Employer.**

7. An instruction in the exact language of section 5244, Revised Codes, declaring that the employer must in all cases indemnify the employee for losses caused by the former's negligence, was properly given.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 345.

**Same—Impairment of Earning Capacity.**

8. In the absence of a request for a more specific instruction on the plan to be adopted in determining the damages suffered by plaintiff for impaired earning capacity, one in substance the same as that reviewed in *Bourke v. Butte etc. P. Co.*, 33 Mont. 267, was proper.—*Wallace v. Chicago, M. & P. S. Ry. Co.*, 345.

**Promissory Notes—Want of Consideration—When not Defense.**

9. In an action by an indorsee before maturity to enforce collection of a negotiable promissory note, an instruction that if there was not any consideration for the instrument as between the maker and the payee, verdict must be for defendant, was erroneous.—*First Nat. Bank of Miles City v. Barrett*, 359.

**Harmless Error—Erroneous Instruction Favorable to Appellant.**

10. Appellant cannot complain of an instruction, even though incorrect, which was as favorable to him as he could ask.—*Stokes v. Long*, 470.

**Error in—Duty of Appellant.**

11. On motion for new trial, neither the district nor the supreme court on appeal can consider any error in instructions not specifically pointed out at the time of settlement thereof.—*Stokes v. Long*, 470.

**Criminal Law—When Refusal Proper.**

12. Where under the evidence the defendant was either guilty of unlawful homicide or not guilty at all, refusal to give an instruction defining the lesser offense of assault was proper.—*State v. Lewis*, 495.

**Same—"Reasonable Doubt"—Definition.**

13. An instruction that a reasonable doubt is a doubt founded on reason and not one arising from mere caprice or groundless conjecture, though not in the words of the one approved in *Territory v. McAndrews*, 3 Mont. 158, was not open to objection.—*State v. Lewis*, 495.

**Same.**

14. After the trial court has fully stated to the jury in the instructions the presumptions of which the law gives the defendant charged with crime the benefit, it is sufficient if they are told that they must acquit him unless they are satisfied of his guilt beyond a reasonable doubt, without further definition of that term.—*State v. Lewis*, 495.

**What are not.**

15. Directions to the jury as to their conduct in the jury-room and as to the form in which they may return their verdict are not instructions on the law of the case, which must be in writing; hence they may be given orally.—*State v. Lewis*, 495.

**Street Railways—Liability of Carrier—Erroneous Instructions.**

16. Instructions in an action by a passenger against a street railway company tried under the common law, that the carrier's responsibility for personal injuries due to defective appliances was confined to cases where such defects were visible or of long standing, and that responsibility could be avoided by a showing that some sort of an inspection had been made by a person competent to make a proper one, were erroneous, the carrier under the common-law rule being liable for defects which a most rigid examination might disclose, and for the slightest negligence in this respect.—*Batch v. Helena L. & Ry. Co.*, 517.

**Same—Liability of Carrier—Correct Statement of Law.**

17. Where the jury were correctly instructed that proof of the accident to plaintiff caused by the breaking of a strap while the conductor was in the act of registering a fare by means of it, cast upon defendant company the burden of its exoneration; that it owed to plaintiff the highest degree of care; that such degree of care was required in the inspection of its equipment, including the strap, and keeping it in repair, and to anticipate all such results as might reasonably be expected in view of the conditions under which the equipment might be used, error in other instructions touching the liability of defendant was rendered harmless.—*Batch v. Helena L. & Ry. Co.*, 517.

**INTERSTATE COMMERCE.**

What does and what does not constitute,—see *Personal Injuries*, 38-40.

**INTOXICATING LIQUORS.****License—Transfer—Appeal—Moot Questions.**

1. Where, after an appeal from a judgment affirming a decision of the county commissioners refusing an application for the renewal of a liquor license, the county in question became subject to the local option statute, the appeal held to present only moot questions, inasmuch as a new trial, if error occurred, would not avail appellant.—*Honstain v. Board of County Commrs.*, 391.

**Application for License—Contest—Nature of Proceeding—Parties.**

2. Upon a contested application for a retail liquor license, the proceedings are analogous to a trial, the applicant being the plaintiff, the



contestants the defendants, and the board of county commissioners the tribunal which hears the contest.—*Honstain v. Board of County Commrs.*, 391.

**Board of County Commissioners—Discretion—Burden of Proof.**

3. Before the discretion of a board of county commissioners can be appealed to in the matter of an application for a retail liquor license, it must appear affirmatively that it has the power to act, the applicant having the burden of proof.—*Honstain v. Board of County Commrs.*, 391.

**License—Renewal—Refusal—Appeal—Trial *De Novo*.**

4. On appeal to the district court from the decision of a board of county commissioners refusing an application for the renewal of a saloon license, the cause is tried *de novo*, and the relative situation of the parties is the same as before the commissioners, it being incumbent upon appellant to make out his *prima facie* right to a license before invoking the discretion of the court.—*Honstain v. Board of County Commrs.*, 391.

**Same—Transfer—Statutes.**

5. Though, under Chapter 35 of the Laws of 1913, a retail liquor license is negotiable and transferable within the county of its issuance, a purchaser of such a license entitling the holder to engage in the saloon business in the town of J. may not, by virtue of such license, undertake to carry on the same business in the town of F., in the same county, where the maximum number of saloons allowed by law was already being conducted.—*Honstain v. Board of County Commrs.*, 391.

**ITINERANT VENDERS.**

See Licenses.

**JUDGMENT-ROLL.**

Copy of—Sufficiency,—see Record on Appeal, 1.

**JUDGMENTS.**

Assignment of proceeds,—see Sheriffs, 1.

Defective,—see Appeal and Error, 1.

On merits rendered in chamber—Jurisdiction,—see District Courts, 2.

***Res Judicata*—Judgment on Merits—Failure to Appeal—Effect.**

1. A judgment, in an action for damages caused to plaintiff's property by a change in a street grade, which recited that, as shown by the evidence, it was barred by subdivision 3 of section 6447, Revised Codes, being upon the merits, was conclusive on that point, and in the absence of a timely appeal, became final, and constituted a bar to another action on the same cause.—*Peterson v. City of Butte*, 13.

**Default—Vacation—Fraud—Decree Final, When.**

2. Where the owner of land who had conveyed it with an agreement that the grantee should reconvey to him upon payment of a debt owed by him to the grantee, permitted his default to be entered in an action by the grantee to have the agreement to reconvey canceled because of the failure of the grantor to make payment, and thereafter neither he nor his guardian, subsequently appointed, asked to have the default set aside, the decree in favor of plaintiff became final and could not be set aside except for fraud, knowledge of which was ascertained after the time had expired within which such legal remedy might have been invoked.—*Dunne v. Yund*, 24.

**Same—Annulment.**

3. A party who, having ample time to prepare and interpose his defense that an ostensible sale of realty was in fact intended as a mortgage, omits to interpose it, cannot, in the absence of fraud by his opponent by which he was deprived of his day in court, subsequently impeach the decree on the ground that an erroneous conclusion was reached.—*Dunne v. Yund*, 24.

**Same—Annulment.**

4. Suppression of the truth relating to the circumstances attending a transfer of realty, claimed by the seller to have been intended as a mortgage and not a sale, does not constitute the character of fraud for which equity will set aside a decree; the fraud in respect to which such relief will be granted must have been perpetrated by the adversary of the complaining party in some matter collateral to the issue tried, by which he was prevented from having a full hearing.—*Dunne v. Yund*, 24.

**Default Judgments—When Vacation Error.**

5. Under section 6589, Revised Codes, a default may not be vacated in any case, upon the expiration of six months after its entry.—*Smith v. McCormick*, 324.

**Same—Vacation—Insufficient Showing.**

6. An affidavit in support of a motion to set aside a judgment entered for want of appearance, which did not state when defendant first learned that judgment had been taken against him; that it had been taken through his inadvertence, mistake or excusable neglect; that it exceeded the fair value of the property sued for; or allege facts constituting a defense, *held* insufficient to move the trial court's discretion to vacate the judgment.—*Smith v. McCormick*, 324.

**Same—Justices' Courts—Appeal to District Court.**

7. An appeal to the district court lies from a judgment by default rendered by a justice of the peace.—*Taylor v. Combs*, 427.

**Juvenile Delinquents—Contents.**

8. Before a delinquent child can be taken from its parent or guardian, the court must adjudge the unfitness, unwillingness or inability of the latter to properly care for it, and that it is for the best interest of the child and for the people of the state that it be given over to the custody of the state.—*In re Satterthwaite*, 550.

**JUDICIAL SALES.**

Right of redemption,—see *Mortgages*, 12.

**JURISDICTION.**

See *District Courts*; *Supreme Court*.

**JURY.**

See, also, *Verdicts*.

**Jury Trial—Constitution.**

1. Under section 23, Article III, of the state Constitution, the right of trial by jury is preserved as it existed at the time the Constitution was adopted.—*Davidson v. Davidson*, 441.

**Same—Divorce Suit.**

2. *Held*, under the rule above, that since the right to a trial of a contested divorce suit did not exist at the time the Constitution was adopted, a party to such a suit may not now demand, as a matter of right, a jury trial of the issues raised by the pleadings.—*Davidson v. Davidson*, 441.

**Juvenile Delinquents—Jury Trial.**

3. Where the mother of an alleged delinquent daughter was not accorded the opportunity to exercise, or waive, the right to a jury trial conferred by Chapter 122, Laws of 1911; and the record failed to disclose whether a jury trial was had, and whether the accused waived her right to such a trial or was apprised of it, the judgment committing her to a reformatory institution *held* void on *habeas corpus*.—In re Satterthwaite, 550.

**JUSTICES OF THE PEACE.****Judgment by Default—Appeal to District Court.**

1. An appeal to the district court lies from a judgment by default rendered by a justice of the peace.—Taylor v. Combs, 427.

**JUVENILE DELINQUENTS.****Petition—Contents.**

1. The petition to have a juvenile delinquent committed under the provisions of Chapter 122, Laws of 1911, must, among other things, charge that the persons having the custody of the child are unfit, unwilling or unable to care for, educate, control or discipline it, or that their consent has been obtained that the delinquent might be taken from them. In re Satterthwaite, 550.

**Citation—Failure to Serve—Effect.**

2. The person from whose custody a child is intended to be taken under the Juvenile Delinquent Act must be made a party and receive notice by citation; failure to give it will render subsequent proceedings void.—In re Satterthwaite, 550.

**Jury Trial.**

3. Where the mother of an alleged delinquent daughter was not accorded the opportunity to exercise, or waive, the right to a jury trial conferred by Chapter 122, Laws of 1911; and the record failed to disclose whether a jury trial was had, and whether the accused waived her right to such a trial or was apprised of it, the judgment committing her to a reformatory institution *held* void on *habeas corpus*.—In re Satterthwaite, 550.

**Judgment—Contents.**

4. Before a delinquent child can be taken from its parent or guardian, the court must adjudge the unfitness, unwillingness or inability of the latter to properly care for it, and that it is for the best interest of the child and for the people of the state that it be given over to the custody of the state.—In re Satterthwaite, 550.

**LACHES.****Deeds Absolute—Mortgages.**

1. Where plaintiff, in an action to have a deed absolute in form decreed a mortgage, did not make any claim to the property for more than twenty-one years after the date of the instrument and until the only person conversant with the facts had died, his claim was barred by laches.—Harrington v. Butte & Superior C. Co., Ltd., 263.

**Election Contest—What Does not Constitute.**

2. A suit to test the legality of a county seat election, brought fourteen weeks after the result was declared and fifteen weeks after the election had taken place, was not barred by laches.—Poe v. Sheridan County, 279.

**Notice.**

3. Until plaintiff irrigation district had notice of defendant's diversions of its impounded waters, it could not be charged with permitting

him to do so, and hence with laches in failing to institute action against him.—Canyon Creek Irr. Dist. v. Martin, 339.

**LAW OF THE CASE.**  
See Appeal and Error, 2.

**LIBEL AND SLANDER.**  
See, also, Contempt, 3.

**Slander—Repetition—Malice.**

1. The repetition of slanderous words at different times is a sufficient showing of malice to entitle plaintiff to recover punitive damages.—Fowlie v. Cruse, 222.

**Same—Punitive Damages—Wealth of Defendant.**

2. The wealth and social standing of defendant charged with slander may be looked to by the jury in determining the punitive damages to be assessed.—Fowlie v. Cruse, 222.

**Same—Detectives—Declarations of Agent.**

3. Defendant in an action for slander had employed detectives to obtain information relative to the whereabouts of articles of jewelry thought by him to have been stolen by plaintiff, a hotel-keeper. They, in conversations with plaintiff, repeated defendant's words in effect charging the former with theft. Plaintiff was permitted to testify to these declarations. *Held* prejudicial error.—Fowlie v. Cruse, 222.

**Same—Damages—Evidence—Proper Rebuttal.**

4. Plaintiff, a hotel-keeper, having introduced evidence to the effect that after the alleged slander, her daily income from her business had decreased substantially, it was error to deny defendant the right to show in rebuttal that during the same time the business of other hotels of the same class likewise declined, as tending to establish that the loss suffered by plaintiff was properly attributable to causes foreign to the alleged wrong.—Fowlie v. Cruse, 222.

**Same—Privileged Communications—Waiver.**

5. By making the slanderous statement in the presence of a stranger, defendant removed the bar of privilege otherwise attending communications made by him to his agents only, which might have protected him, in the absence of actual malice. (Rev. Codes, sec. 3604.)—Fowlie v. Cruse, 222.

**Same—Instructions.**

6. Instruction to the jury that in order to find for plaintiff the proof must show that defendant uttered the words made the basis of an action for slander, or "substantially similar words," *held* not prejudicially erroneous.—Fowlie v. Cruse, 222.

**Same—Instructions—Good Character—Presumptions.**

7. An instruction that, in the absence of evidence to the contrary, the law presumes that the plaintiff in an action for slander possesses a good reputation, *held* proper under section 8026, Revised Codes.—Fowlie v. Cruse, 222.

**LICENSES.**

Retail liquor licenses,—see Intoxicating Liquors, 1-5.

**Itinerant Venders—Complaint—Sufficiency.**

1. Complaint in an action to recover a license fee under Chapter 110, Laws 1911, the manifest import of which was that defendant, without first procuring a license, engaged in the business of itinerant vender, and in the business of soliciting orders, *held* sufficient to charge

liability for the license as itinerant vender at least, and that therefore a demurrer to the pleading was properly overruled.—*State v. Turnmire*, 331.

## LIMITATIONS OF ACTIONS.

See Estoppel, 1.

## LIVESTOCK.

Breach of contract of sale, measure of damages,—see Contracts, 1.

Killing by railroads,—see Railroads, 1.

Trespassing,—see Animals, 1-6.

## MALICE.

False imprisonment,—see False Imprisonment, 2.

Wrongful dishonoring of check,—see Banks and Banking, 1.

Slander—Repetition.

1. The repetition of slanderous words at different times is a sufficient showing of malice to entitle plaintiff to recover punitive damages.—*Fowlie v. Cruse*, 222.

## MALICIOUS PROSECUTION.

Want of Probable Cause—Nonsuit.

1. In an action by an attorney for malicious prosecution in instituting and carrying on a proceeding for his disbarment, a nonsuit was properly granted for failure of plaintiff to show want of probable cause, without the establishment of which element plaintiff in such an action cannot prevail.—*Ryan v. Johnson*, 100.

## MANDAMUS.

See, also, Elections, 1; Counties, 1; State Lands, 3-6.

Jurisdiction of Supreme Court.

1. After the institution of proceedings in *mandamus* to compel a district court to restore a bill of exceptions stricken from the files and a settlement thereof, the supreme court cannot be ousted of jurisdiction by an order rescinding the order striking the bill and making one refusing settlement for reasons which must have existed when the order complained of was made.—*State ex rel. Lindsey v. Ayers*, 62.

Bill of Exceptions—Settlement.

2. Where a party pursues the statute in the preparation, service and presentation of his proposed bill of exceptions, he is entitled to have it settled as a matter of right, and settlement may be compelled by *mandamus*.—*State ex rel. Lindsey v. Ayers*, 62.

Does not Lie—When.

3. In the absence of a clear showing that the board of examiners abused the discretion lodged in it in determining whether relator was a proper person to be recommended to the governor for certification as a registered nurse, the writ of mandate did not lie.—*State ex rel. Scollard v. Board of Examiners*, 91.

Criminal Law—Witnesses—Subpoenas—County Attorney.

4. Since subdivision 3 of section 9486, Revised Codes, lodges the power in the county attorney to issue subpoenas for the attendance of witnesses in criminal cases, and the writ does not lie where another adequate remedy exists, *mandamus* will not issue at his instance to compel a district judge to make an order authorizing the clerk of the court

to do what relator himself may do.—State ex rel. Wolfe v. District Court, 556.

**Fraud—Discretion.**

5. *Mandamus* is not a writ of right, but issues only in the discretion of the court; hence where it is made to appear that with reference to the very question at issue the conduct of the party asking for the writ has been tainted with fraud or such as to render the granting of it inequitable, the relief may be refused.—State ex rel. Danaher v. Miller, 562.

**MARRIAGE.**

Breach of promise—Survival of action,—see Actions, 1.

**METROPOLITAN POLICE LAW.**

See Cities and Towns, 15–17.

**MILEAGE.**

Of witnesses,—see Costs, 1.

**MILITIA.**

**Trespass—Destruction of Property—Civil Liability—Justification—Pleading.**

1. The defense in an action in trespass that, while engaged in restoring law and order in a city proclaimed by the governor to be in a state of insurrection, defendants, as officers of the organized state militia, were justified in having plaintiff's stock of liquors destroyed for an alleged infraction of a rule limiting their sale to certain hours, must be specially pleaded both at common law and under the Codes; in the absence of such pleading, evidence to show justification was inadmissible.—Herlihy v. Donohue, 601.

**Same—Destruction of Property—Due Process of Law.**

2. Conceding (but not deciding) that an order of the commanding officer of the state militia closing saloons during certain hours in times of public disorder has the force and effect of a statute, yet punishment for disobedience of such an order by way of destruction of the stock of liquors of the offender, without notice, a hearing or an adjudication is unwarranted, and for their destruction he is liable in damages.—Herlihy v. Donohue, 601.

**Same—State—Police Power—Extent.**

3. Under its police power, the state may regulate or control every act or thing within its jurisdiction which tends to subvert the government, to injure the public, to destroy the morals of the people, or to disturb the peace and good order of society.—Herlihy v. Donohue, 601.

**Same—Destruction of Private Property—Compensation.**

4. It is only within the narrow limits of actual and pressing necessity that private property may be taken and destroyed for the public good. Herlihy v. Donohue, 601.

**Same—Subordinate Officers—Civil Liability—Rule.**

5. A subordinate officer of the state militia may defend his acts against civil liability by reference to the order of his superior officer, unless it is so palpably illegal or without authority that a reasonably prudent man ought to recognize its invalidity or want of authority, in which event obedience furnishes no excuse for a wrongful act even though disobedience may subject the offender to punishment at the hands of a military tribunal.—Herlihy v. Donohue, 601.

**Same—Subordinate Officers—Civil Liability—Case at Bar.**

6. Inasmuch as the commanding officer of the state militia might, if the circumstances of the case warranted it, lawfully have given an

order for the destruction of a stock of intoxicating liquors in times of public disorder which he had been directed by the governor to suppress, subordinate officers commanded to carry out the order to destroy were, under the rule last above stated, relieved from civil liability for the ensuing damage.—*Herlihy v. Donohue*, 601.

## MINES AND MINING.

Extralateral Rights—Common-law Rights—Injunction *Pendente Lite*.

1. Plaintiff owned the Badger and Emily claims, the former being the older location, both *prima facie* entitled to extralateral rights. The Badger State (or south) vein [see Diagram 4] as well as the Emily (or north) vein passed through the west end-line of the Emily and through its south side-line, the former at B and the latter at A, dipping to the north and uniting 900 feet below the surface, and from the point of union the united vein so far departed from a perpendicular on its descent into the earth that on the 1800-foot Badger State level it passed beyond the Emily north side-line and into territory beneath the surface of the Pilot claim, belonging to defendant. *Held*, on appeal from an order enjoining defendant from mining upon the united vein beneath the surface of its claim between a plane drawn through the Emily west end-line and a plane drawn through the Badger State east end-line projected north indefinitely, that the Badger State claim, being the older location, was entitled to the entire vein from the point of union by virtue of section 2336, United States Revised Statutes; that below the point of union the rights of the Emily claim were terminated by the plane B-F; that the ore within so much of the triangle B-C-F as lies beneath the surface boundaries of the Pilot claim belongs to defendant by virtue of its common-law rights, and that therefore the injunction order was too broad. (See opinion on rehearing for modification.)—*Anaconda Copper Min. Co. v. Pilot Butte Min. Co.*, 165.

## Same—Extent.

2. The owner of a quartz lode mining claim asserting extralateral rights is entitled to only so much of the vein on its dip as he has apex within the surface boundaries of the claim.—*Anaconda Copper Min. Co. v. Pilot Butte Min. Co.*, 165.

## Same—Continuity of Right.

3. One who seeks to follow a vein from the apex thereof within his lode mining claim, to ore beneath the surface of a claim adjoining, must have continuity of right.—*Anaconda Copper Min. Co. v. Pilot Butte Min. Co.*, 165.

## Same—Trespass.

4. The owner of a lode mining claim seeking to reach ore bodies underneath the location of another, by virtue of his right to follow extralaterally a vein apexing within his surface boundaries, cannot do so if, in order to accomplish his purpose, he must trespass upon intervening rights.—*Anaconda Copper Min. Co. v. Pilot Butte Min. Co.*, 165.

## Same—Secondary Veins.

5. (On rehearing.) The owner of a lode mining claim, if entitled to extralateral rights, may claim such rights not only upon the discovery but also upon the secondary veins found within its surface lines, at least for so much thereof as apex therein, the rights as to secondary veins not being confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end-lines of the claim are the end-lines of all veins apexing within the surface boundaries, the bounding planes for extralateral rights on the secondary veins, though required to be drawn parallel to the end-lines, need not be coincident.—*Anaconda Copper Min. Co. v. Pilot Butte Min. Co.*, 165.

## MINORS.

Death by drowning in natatorium,—see Personal Injuries, 29-31.

Delinquents,—see Juvenile Delinquents.

Injuries to,—see Personal Injuries, 7, 8.

Negligent use of automobile by,—see Personal Injuries, 9-17.

## MISTAKE.

In execution of note,—see Evidence, 3.

Mutuality,—see Reformation of Instruments, 1.

## MONOPOLIES.

Unfair discrimination in buying commodities,—see Criminal Law, 8.

## MOOT QUESTIONS.

See Appeal and Error, 12.

## MORTGAGES.

Real Property—Sales—Contract to Reconvey—Effect.

1. The owner of realty may sell it and receive back an agreement for a reconveyance the consideration for which is a pre-existing debt, without establishing the relation of mortgagor and mortgagee, the effect of the transaction—as to whether it constitutes a sale or a mortgage—depending upon the intention of the parties to be ascertained from the attendant circumstances.—*Dunne v. Yund*, 24.

Chattel Mortgages—Attaching Creditors—Effect of Making Deposit—Right of Mortgagee.

2. By depositing with the county treasurer (Rev. Codes, sec. 5766), the amount of a prior mortgage on property which he seeks to attach, a creditor does not pay the debt secured thereby or discharge the mortgage, but is substituted to the right of the mortgagee to have recourse to the mortgaged property; a destruction of this right of recourse, by connivance between the mortgagor and mortgagee, is redressible in damages.—*Degenhart v. Cartier*, 102.

Same—Case at Bar.

3. To enable a creditor to attach cattle on which there was a chattel mortgage, he deposited with the county treasurer, payable to the mortgagee, the amount secured thereby, but before the levy of the writ could be made, the defendant mortgagor, in connivance with the mortgagee, placed a second mortgage in favor of the latter on the property; after the levy had been made, the defendants demanded the release of the cattle because of the prior lien of the second mortgage; the sheriff released, and upon demand made, the amount of the deposit was paid over to the defendants, the mortgagee satisfying the first mortgage of record. In an action to recover the deposit made by the attaching creditor, the complaint setting forth the above facts at length, *held* to state a cause of action.—*Degenhart v. Cartier*, 102.

Same—Making Deposit—Who not Interested in.

4. The provision of section 5766, Revised Codes, requiring an attaching creditor to tender or deposit the amount of a prior mortgage with interest, was designed solely for the benefit of the mortgagee, and therefore neither the mortgagor nor a junior creditor was concerned in such deposit.—*Degenhart v. Cartier*, 102.

Same—What may be Mortgaged.

5. While, independently of statute, one cannot sell or mortgage personal property not in existence or in which he has no present interest,



property which has a potential existence may be mortgaged or hypothecated.—*Isbell v. Slette*, 156.

**Same—Annual Crops—Extent of Lien.**

6. Annual crops have a potential existence even before they are planted, and the owner, or one rightfully in possession, of land has a mortgageable interest in the crops thereafter to be planted thereon, the lien of such mortgage not attaching until they are planted, and being limited to the interest which the mortgagor has.—*Isbell v. Slette*, 156.

**Same—Nature of Transaction.**

7. A mortgage of the character of the above, *held* to be, in effect, no more than an executory contract which may become executed when the crops are planted and the lien attaches, or defeated if for any reason the mortgagor violates faith and fails or refuses to plant the crops.—*Isbell v. Slette*, 156.

**Same—Filing—Constructive Notice to Whom.**

8. The purpose of filing a chattel mortgage being to protect *bona fide* creditors and subsequent purchasers and encumbrancers (Rev. Codes, sec. 5758), constructive notice is imparted by the act of filing to such only; hence a lessee who, without actual notice of a mortgage given by the owner of land upon future crops, took possession of it before seeding time, and thereafter planted and harvested the crops,—being neither creditor, purchaser nor encumbrancer,—was not chargeable with constructive notice of the existence of the mortgage.—*Isbell v. Slette*, 156.

**Deeds of Trust—Right of Redemption.**

9. The provisions of sections 6813–6847, Revised Codes, governing the right of redemption, apply as well to a decree enforcing a deed of trust as to one foreclosing a mortgage.—*The Banking Corporation of Montana v. Hein*, 238.

**Same—"Equity of Redemption"—Definition.**

10. The "equity of redemption" from a mortgage or trust deed sale is a substantive property right which the mortgagor retains and which may be sold or seized on attachment or execution; it comes into existence when the property is hypothecated, and is terminated by a sale, either under a power of sale or by virtue of a decree.—*The Banking Corporation of Montana v. Hein*, 238.

**Same—"Right of Redemption"—Definition.**

11. The "right of redemption" arises only upon such sale, exists for the period fixed by law, and is not property in any sense, but a bare personal privilege of statutory origin to be exercised only by the persons named in the statute in the instances mentioned therein, and within the time and upon the conditions prescribed.—*The Banking Corporation of Montana v. Hein*, 238.

**Same—"Right of Redemption"—Limited to Judicial Sales.**

12. The right of redemption referred to in the statute relating to redemptions is limited to judicial sales; hence it has no application to a sale by virtue of a power contained in a mortgage or deed of trust.—*The Banking Corporation of Montana v. Hein*, 238.

**Same—Right of Redemption—Burden of Proof.**

13. The right of redemption being statutory, the burden is upon anyone, claiming by or under it, to show its existence, and that he is in a position to invoke its benefit.—*The Banking Corporation of Montana v. Hein*, 238.

**Deed Absolute—Mortgage—Evidence—Insufficiency.**

14. In an action to have a deed absolute declared a mortgage, evidence *held* insufficient to meet the requirement of the rule under which the proof must be clear and convincing to warrant relief.—*Harrington v. Butte & Superior C. Co., Ltd.*, 263.

**"Once a Mortgage, Always a Mortgage."**

15. The rule of the maxim, "once a mortgage, always a mortgage," has application only to cases in which relief is sought by the mortgagor against the mortgagee himself or his grantee with notice.—*Harrington v. Butte & Superior C. Co., Ltd.*, 263.

**Notice—Estoppel.**

16. Where a mortgage is in the form of a deed absolute, and there is no written defeasance of record, one who becomes a grantee of the mortgagee without notice of the fact that the deed was intended as a mortgage, acquires title free from the lien, and the mortgagor is estopped by the deed from questioning the purchaser's title.—*Harrington v. Butte & Superior C. Co., Ltd.*, 263.

**Laches.**

17. Where plaintiff, in an action to have a deed absolute in form decreed a mortgage, did not make any claim to the property for more than twenty-one years after the date of the instrument and until the only person conversant with the facts had died, his claim was barred by laches.—*Harrington v. Butte & Superior C. Co., Ltd.*, 263.

**Recordation—Fees—By Whom to be Paid.**

18. Recording fees are to be paid by those whose interests are protected by recordation—in case of mortgage, by the mortgagee.—*Hill v. Rae*, 378.

**Same—Exemptions—Power of State.**

19. The state could properly exempt itself or its officers from the payment of recording fees on mortgages given under the Farm Loan Act.—*Hill v. Rae*, 378.

**Extinguishment—Statute of Limitations.**

20. While in the absence of legislation declaring a different rule the lien of a mortgage on real property is not extinguished by the lapse of the period fixed by the statute within which an action to enforce payment of the debt may be brought and prosecuted to a successful termination, such lien held to be so extinguished by section 5728, Revised Codes.—*Berkin v. Healy*, 398.

**Re-creation—How not Effected.**

21. In view of section 5749, Revised Codes, providing that a mortgage of real property can be created, renewed or extended only by writing with the formalities required in the case of a grant of real property, a part payment by a mortgagor after the principal obligation was barred could not re-create the lien of the mortgage.—*Berkin v. Healy*, 398.

**Quieting Title—Barred Mortgage.**

22. Notwithstanding a mortgage had ceased to be a lien upon the property, it was a cloud upon the title thereto, because it was ostensibly a mortgage valid on its face and required extrinsic evidence to demonstrate that it was in fact of no force.—*Berkin v. Healy*, 398.

**Power of Sale—Exercise—Extinguishment of Lien.**

23. Proceedings under a power of sale contained in a mortgage presuppose a valid mortgage lien upon the property originally mortgaged, so that, where the lien of the mortgage had been extinguished as set forth in paragraph 20 above, the mortgagees could no longer exercise such power of sale.—*Berkin v. Healy*, 398.

**Renewal.**

24. Though the legislature has the power to so change the statute as to revive the right of action on a barred debt, such revival cannot, against the property owner's consent, re-create a mortgage lien which was extinguished by failure to bring action upon the debt within the period fixed by statute.—*Berkin v. Healy*, 398.

**Renewal Against Owner's Consent—Statutes—Constitution.**

25. If by Chapter 27, Laws of 1913, it was intended to enable a mortgagee whose mortgage had been extinguished by lapse of time, to revitalize the security and impose a lien upon property without the owner's consent, it to that extent deprives him of his property without due process of law, and is invalid.—*Berkin v. Healy*, 398.

**Principal and Agent—Fraud—Assignment—Effect.**

26. Where an agent falsely reported to his principal that he had purchased clear title to land with money furnished to him by the latter for that purpose, and later paid a mortgage thereon, causing it to be formally assigned to a third party, who knew nothing of the transaction and paid nothing, any title passed by the assignment vested in the principal.—*Northwestern Improvement Co. v. Rhoades*, 428.

**Assignment to Owner—Merger.**

27. A mortgage which passed to the owner in fee, who has no intention to keep it alive, is extinguished by merger.—*Northwestern Improvement Co. v. Rhoades*, 428.

**Satisfaction of—What may Constitute.**

28. *Obiter*: Under the circumstances referred to in paragraph 26, *supra*, the action of the agent in paying the mortgagee canceled the debt and satisfied the mortgage, even though such was not his intention. *Northwestern Improvement Co. v. Rhoades*, 428.

**Overdue Notes—Accepting Without Inquiry—Effect.**

29. A bank which in consideration of a loan accepted an overdue note and a mortgage securing it without inquiry of the record owner of the mortgaged land, was at fault and was therefore properly adjudged to bear the loss incident to the dishonest transaction mentioned in paragraph 26, *supra*.—*Northwestern Improvement Co. v. Rhoades*, 428.

**MUNICIPAL CORPORATIONS.**

See Cities and Towns; Counties.

**NEGOTIABLE INSTRUMENTS.****Attorneys' fees,—see, also, Costs, 2-4.****Promissory Notes—Verdict—Responsiveness to Issues.**

1. In an action to recover on two promissory notes, the defense to one of which was payment, and want of consideration as to the other, a general verdict in a lump sum, *held* to have been responsive to both issues.—*McDonald v. Klenze*, 142.

**Same—Verdict—Finding in Favor of Appellant—Right to Complain.**

2. Where the jury in an action on promissory notes awarded plaintiff much less than they might have done, defendant was not in a position to complain that under the pleadings and evidence plaintiff should either have recovered the whole amount sued for or nothing, and hence that the verdict must have been reached by a compromise and should not be allowed to stand.—*McDonald v. Klenze*, 142.

**Same—Fraud—Pleadings—Conclusions.**

3. An allegation in answer to the complaint in an action on a promissory note that its date had been fraudulently changed by plaintiff was a mere conclusion, and insufficient to tender issue as to an intentional, material alteration precluding recovery under section 5069, Revised Codes.—*McDonald v. Klenze*, 142.

**Same—Mistake in Execution—Evidence—Admissibility.**

4. Evidence by plaintiff that a note sued on was inadvertently dated "1904" instead of "1905" because, it being at the beginning of the new year, he had not yet become accustomed to writing the new date, was

admissible, where the answer was insufficient to tender issue as to an intentional material alteration by plaintiff.—*McDonald v. Klenze*, 142.

**Same—Compromise—Tender of Payment—Evidence—Admissibility.**

5. It is not error to admit evidence, in a suit on a note, that defendant offered, after suit was brought, to pay same by transfer of stocks and bonds, where it was not clear whether the offer was intended as a compromise or tender of payment, and the court instructed the jury to determine what defendant's purpose was in making the offer, and directed them to disregard the evidence if they reached the conclusion that the offer was intended as a compromise by defendant for the purpose of buying his peace.—*McDonald v. Klenze*, 142.

**Same—Attorney's Fee—When Recoverable as Costs.**

6. Where a promissory note expressly provided that "attorneys' fees in addition to other costs" might be recovered in the event of suit, the fees were by such stipulation taken out of the category of special damages assessable by a jury, and placed among costs recoverable in addition to those awarded by statute.—*Bovee v. Helland*, 151.

**What Constitutes.**

7. To constitute an instrument a negotiable one, it must, under section 6032, Revised Codes, be in writing, signed by the maker, contain an unconditional promise to pay a sum certain in money, and be payable, on demand or at a fixed or determinable future time, to order or bearer.—*First National Bank of Miles City v. Barrett*, 359.

**Negotiability not Destroyed, by What.**

8. The negotiable character of a promissory note which met the requirements of the statute enumerated above was not affected by recitals therein contained: That the makers had purchased a stallion from the payee; that the indebtedness should bear interest at a fixed rate, payable semi-annually; that upon default of an interest installment, the principal sum with interest should become due; that the makers should pay an attorney fee in case collection had to be enforced, coupled with an order authorizing delivery of the animal to any one of the makers.—*First National Bank of Miles City v. Barrett*, 359.

**Defenses Available.**

9. The defenses of want of title in plaintiff and forgery of defendant's signature are available whether the instrument sued on be negotiable or non-negotiable.—*First National Bank of Miles City v. Barrett*, 359.

**Want of Consideration—When not Defense.**

10. In an action by an indorsee before maturity to enforce collection of a negotiable promissory note, an instruction that if there was not any consideration for the instrument as between the maker and the payee, verdict must be for defendant, was erroneous.—*First National Bank of Miles City v. Barrett*, 359.

**Holder in Due Course—Accepting Overdue Note—Effect.**

11. A bank which accepted a note four years overdue did not become a holder in due course, but took only the title thereto which the assignor, its debtor, had, with the risk of all defects therein as well as of the defenses to it or demands existing at the time against him with reference to it.—*Northwestern Improvement Co. v. Rhoades*, 428.

**Overdue Notes—Accepting Without Inquiry—Effect.**

12. A bank which in consideration of a loan accepted an overdue note and a mortgage securing it without inquiry of the record owner of the mortgaged land, was at fault and was therefore properly adjudged to bear the loss incident to the transaction accompanied by fraud.—*Northwestern Improvement Co. v. Rhoades*, 428.

NEGLIGENCE.

See Personal Injuries; Physicians and Surgeons.

NEWSPAPERS.

Publication of libelous article,—see Contempt, 3.

NEW TRIAL.

For material variance,—see Pleading and Practice, 24.

Record on appeal,—see Appeal and Error, 15.

Trial—Inconsistent Theories.

1. Where, on appeal from an order denying a new trial in an action to quiet title to a strip of land granted for a railroad right of way, neither counsel agreed with the other nor with the trial court as to the theory or theories upon which the cause was tried, and the two theories apparently adopted by the court—estoppel *in pais* and mutual mistake in the description of the land in the deed—were contradictory of each other, a new trial *held* proper.—R. M. Cobban Realty Co. v. Chicago etc. Ry. Co., 256.

Misconduct of Counsel—Affidavits—Determination of Facts.

2. Where affidavits were submitted on motion for new trial alleging improper statements of plaintiff's counsel, and counter-affidavits filed putting the allegations in issue, it was the province of the trial court to determine the facts from the conflicting affidavits.—Pascoe v. Nelson, 405.

Same—Duty of Appellant.

3. Where appellants failed to ask the court at the trial to admonish the jury as to alleged improper remarks made by plaintiff's counsel, their motion for new trial on that ground will not be granted.—Pascoe v. Nelson, 405.

Same—Harmless Error.

4. Where defendants voluntarily made known to the jury that their liability for injuries to their employees was insured against in an indemnity company, plaintiff's counsel cannot be said to have been guilty of misconduct in commenting upon, and making any legitimate deductions from, such evidence.—Pascoe v. Nelson, 405.

Harmless Error.

5. For alleged error in a ruling which worked to the advantage of appellant, rather than to his prejudice, a new trial will not be ordered. Interstate Power Co. v. Anaconda C. Min. Co., 509.

NONAPPEALABLE ORDERS.

See Appeal and Error, 11.

NONSUIT.

Appeal and Error—Correct Result—Wrong Reason.

1. If a ruling granting a nonsuit was correct, though based upon an erroneous reason, it will nevertheless be affirmed.—Henroid v. Gregson Hot Springs Co., 447.

Review of Evidence.

2. Where defendant introduces evidence after his motion for nonsuit is denied, the court, on appeal, will consider only the question whether the evidence as a whole made a case for the jury.—Stokes v. Long, 470.

## NOTICE.

See Adverse Claim, 1; Laches, 3.

Constructive,—see Mortgages, 8, 16; Waters and Water Rights, 3-5.

## NURSES.

**Board of Examiners—Public Office and Officers—Undertaking on Appeal.**

1. Under Section 7196, Revised Codes, the board of examiners for nurses, being a public office and its members public officers, is relieved from filing a bond on appeal from a judgment compelling it by writ of mandate to recommend to the governor an applicant for certification as a registered nurse.—State ex rel. Scollard v. Board of Examiners, 91.

**Same—Official Oath.**

2. The fact that Chapter 50, Laws of 1913, creating the board of examiners for nurses, does not provide that the members thereof take an official oath, cannot detract from their character as public officers, since section 1 of Article XIX of the Constitution, requiring every public officer within the state to take the oath therein prescribed, is self-executing.—State ex rel. Scollard v. Board of Examiners, 91.

**Good Moral Character—How Determined by Board.**

3. In its determination of the question whether an applicant for registration as a nurse possesses the good moral character made a prerequisite to certification by section 9 of the Act, the board of examiners is not bound to accept affidavits of citizens deposing to such good character as conclusive, but may hear evidence, to be produced before it in such manner as it may choose to adopt, both in opposition to as well as in favor of the applicant.—State ex rel. Scollard v. Board of Examiners, 91.

**Mandamus—Does not Lie—When.**

4. In the absence of a clear showing that the board abused the discretion lodged in it in determining whether relator was a proper person to be recommended to the governor for certification as a registered nurse, the writ of mandate did not lie.—State ex rel. Scollard v. Board of Examiners, 91.

**Character of Applicant—Evidence.**

5. Testimony touching the immoral character of the applicant, introduced at a divorce proceeding to which she was a party, could rightfully be taken into consideration by the board in passing upon the question of her character.—State ex rel. Scollard v. Board of Examiners, 91.

## OFFER AND ACCEPTANCE.

See Contracts, 8-10.

## OFFICE AND OFFICERS.

**Increase in taxable property of county—Effect on,—see Counties, 1.**

**Official oath,—see Nurses, 2.**

**Undertaking on appeal,—see Nurses, 1.**

**Removal—Disqualification of County Attorney—Appointment of Substitute—Power of District Court.**

1. Proceedings for the removal of a public officer under section 9006, Revised Codes, being of a criminal nature, the district court is empowered by section 9309 to appoint some attorney in such a proceeding to perform the duties of the county attorney whenever the

latter is absent on account of either neglect or sickness, or is disqualified for any reason.—State ex rel. *McGrade v. District Court*, 371.

**Same—Statutes.**

2. The power granted to the district court by section 9005, Revised Codes, in a proceeding looking to the removal of the county attorney, to appoint the county attorney of an adjoining county to act as prosecuting officer, may only be exercised when charges are preferred by a grand jury under section 8992.—State ex rel. *McGrade v. District Court*, 371.

**Same—Compensation of Substitute for County Attorney.**

3. An attorney appointed under section 9309, Revised Codes, to perform the duties of a county attorney in a proceeding in which the latter was sought to be removed upon the accusation of a taxpayer charging neglect of duty, may not demand or receive compensation for his services out of the county treasury, the statute not making any provision therefor, and the county not being liable as upon an implied contract to pay what the services are reasonably worth.—State ex rel. *McGrade v. District Court*, 371.

**Same.**

4. A county attorney called into an adjoining county by appointment under section 9005, Revised Codes, to act as prosecuting officer in a proceeding of the nature of that referred to in paragraph 2, *supra*, is not entitled to compensation for services thus rendered.—State ex rel. *McGrade v. District Court*, 371.

**Mandamus—Counties—Assessable Property—Increase in—Evidence.**

5. By reason of an increase in the assessed valuation of property in a county it was raised from the sixth to the fifth class, whereby the office of county auditor came into existence. After relator had been elected to such office, the board of county commissioners refused to order salary warrants to issue to him, for the reason that because of alleged double assessments, clerical errors, *etc.*, the assessed property value was below the amount required to justify the advancement of the county to the higher class. Evidence held to sustain the finding of the trial court that the county had sufficient assessable property to bring it into the fifth class, and that the issuance of a writ of mandate to the board was proper.—State ex rel. *Hauswald v. Ellis*, 505.

**ORDERS.**

Nonappealable,—see Appeal and Error, 11.

Of supreme court, granting costs on appeal,—see Costs, 6.

**PARENT AND CHILD.**

See Juvenile Delinquents; Minors; Personal Injuries, 6-8, 11, 12, 29-32.

**PARTIES.**

In county seat election contest,—see Elections, 3-8.

To contested application for retail liquor license,—see Intoxicating Liquors, 2.

In suit to establish trust *ex maleficio*,—see Trusts, 2.

**PAYMENT.**

Time and manner of,—see Contracts, 2, 3.

## PERSONAL INJURIES.

See, also, Workmen's Compensation.

By reason of malpractice,—see Physicians and Surgeons.

Carrier and Passenger—Derailment—Presumptions—Jury Question.

1. The derailment of a railway car in which plaintiff was riding as a passenger, raised a presumption of negligence; a showing to the contrary by defendant presented a question for the jury.—*Freeman v. Chicago, M. & St. P. Ry. Co.*, 1.

Same—Presumptions—Plaintiff may Rely on, When.

2. Where the record did not establish the cause of a derailment, plaintiff was not deprived of the presumption incident to the derailment.—*Freeman v. Chicago, M. & St. P. Ry. Co.*, 1.

Same—Evidence—Causal Connection—Sufficiency.

3. Evidence held to show a causal connection between the derailment of a railway car and plaintiff's injuries consisting of "wrist-drop" and minor hurts, caused by being thrown against the side of the car, and to establish liability for the resultant damages.—*Freeman v. Chicago, M. & St. P. Ry. Co.*, 1.

Same—Negligence—*Prima Facie* Case—Showing Necessary.

4. In a personal injury action, it is sufficient to make out a *prima facie* case if plaintiff can show that the injury is more naturally to be attributed to the negligence alleged than to any other cause, the rule of absolute exclusion of any other cause not being applicable in civil actions.—*Freeman v. Chicago, M. & St. P. Ry. Co.*, 1.

Same—Mitigation of Damages—Limit of Rule.

5. While an injured person must use ordinary diligence to effect a cure and thus to minimize the damages, he is not required, after one unsuccessful operation, to undergo another and major operation, risking failure in that as well, in order to bring about that result.—*Freeman v. Chicago, M. & St. P. Ry. Co.*, 1.

Parent and Child—Contributory Negligence of Parent.

6. Where the parents of a seven year old child intrusted it to the custody of a person who took it to a place of known danger, i. e., an unguarded mining shaft, gave it no warning and permitted it to play about the mouth of the shaft until it fell into it and was injured, a *prima facie* case of contributory negligence on the part of the custodian—and hence of the parents—was made out, forbidding recovery of damages by the father, in the absence of evidence acquitting him of the imputation of negligence.—*Conway v. Monidah Trust*, 244.

Same—Negligence—Custodian.

7. Customary negligence in the matter of permitting children to play about open mining shafts in the vicinity of the place of the accident, could not exonerate plaintiff from the imputation of negligence.—*Conway v. Monidah Trust*, 244.

Same—Forgetfulness of Duty—Effect.

8. Forgetfulness of his duty to the child intrusted to his care, brought about by his absorption in watching a passing train, did not constitute such an excuse on the part of its custodian as could exculpate plaintiff of the charge of contributory negligence.—*Conway v. Monidah Trust*, 244.

Automobiles—Contributory Negligence—Pleading.

9. A plea of contributory negligence may be coupled with a denial of primary negligence; hence it was error to sustain a demurrer to an answer so pleading, in an action for damages for the death of



plaintiff's intestate alleged to have been caused by the negligent driving of an automobile.—*Lewis v. Steele*, 300.

Same—Demurrer—What not Harmless Error.

10. Error in sustaining a demurrer to the plea of contributory negligence, because coupled with a denial of negligence on defendant's part, thus rendering inadmissible any evidence on contributory negligence as a defense, *held* prejudicial, notwithstanding evidence suggesting contributory negligence was admitted during the trial and instructions on the subject were given.—*Lewis v. Steele*, 300.

Same—Negligence—Parent and Child—Liability of Parent.

11. Since a father is not responsible for the negligent or willful torts of his child, and an automobile is not inherently dangerous, the father may not be held responsible for the killing of a pedestrian by the negligence of his minor son in driving his father's machine, if it was taken without his knowledge or consent, or, if with his consent, it was taken for a purpose foreign to that for which it was kept and customarily used.—*Lewis v. Steele*, 300.

Same—Liability of Parent—*Respondent Superior*.

12. *Held*, that defendant, as owner of an automobile used for the pleasure of himself and his family, including two minor sons upon whom he relied as drivers and from whom he exacted such service, was liable, under the doctrine of *respondent superior*, for injuries to a pedestrian resulting in death, occasioned through the negligent running of the machine by one of his sons who was using it at the time, with defendant's consent, to convey a party of friends to a dance.—*Lewis v. Steele*, 300.

Same—Negligence—Rule of Liability.

13. In the absence of legislation to the contrary, the same general rules of responsibility, direct and consequential, are applicable to the use of an automobile as apply to other common methods of transportation.—*Lewis v. Steele*, 300.

Same—Damages—Earning Capacity—Evidence—Technical Error.

14. The admission of evidence as to the usual charges made by Christian Science practitioners, in the absence of a showing that deceased was accustomed to make such charges, was technical error.—*Lewis v. Steele*, 300.

Same—Excessive Speed—Evidence—Admissibility.

15. Testimony of one of the occupants of the automobile at the time of the accident, that the appearance of deceased was so sudden that it could not have been stopped in time to avoid striking her, even if its speed had not exceeded four miles an hour, was admissible as tending to show that the accident was not due to excessive speed.—*Lewis v. Steele*, 300.

Same—Street Accident—Evidence—Admissibility.

16. It was proper for defendant to show that, when first seen by the occupants of the automobile, the decedent's actions were such as to create the impression that she was waiting for a car, and was not about to cross a street intersection.—*Lewis v. Steele*, 300.

Same—Evidence—Avoiding Effect of Other Evidence—Admissibility.

17. It having been shown that after the accident the machine proceeded to the dance to which defendant's sons and their guests were going, and that defendant's son who drove the car there danced several times, evidence that his other son had inquired at decedent's house and was informed that her injury was not serious was admissible to avoid the prejudice which might arise from the imputation of heartlessness or undue haste.—*Lewis v. Steele*, 300.

**Expert Witnesses—Who may be.**

18. In an action to recover damages sustained by the caving in of a ditch while plaintiff was at work, laborers who had experience in digging trenches for gas and water-pipe and in excavating for buildings could properly testify as experts as to where in the ditch, in their opinion, the fall of earth first began.—*De Sandro v. Missoula Light & Water Co.*, 333.

**Hypothetical Questions—Procedure.**

19. In putting a hypothetical question to a witness, counsel may assume as established all the facts in evidence tending directly or by fair inference to establish his theory of the case, and need not include all the evidence on the subject, opposing counsel having the privilege of including such matters as he deems improperly omitted, in questions propounded by himself; whereupon it is the province of the jury to say whether the facts assumed by the questions were established and whether the opinion based on them has any probative value.—*De Sandro v. Missoula Light & Water Co.*, 333.

**Railroads—Safe Place and Appliances—Evidence—Immateriality.**

20. Where on a former appeal in a personal injury action it was held that the failure of defendant company to provide a safe place or safe appliances with which to work could not have caused, or contributed to, plaintiff's injury, offered evidence that plaintiff never made any complaint as to the dangerous character of his work was immaterial, and its rejection not error.—*Wallace v. Chicago, Milwaukee & P. S. Ry. Co.*, 345.

**Same—Rules—Matter of Defense.**

21. A trade union rule offered in evidence by defendant company, relative to who should direct machinists or assume responsibility for other men's work, which had not been shown to have been adopted by it, was properly rejected.—*Wallace v. Chicago, Milwaukee & P. S. Ry. Co.*, 345.

**Same—Duty of Servant to Obey—Violation of Rule—Effect.**

22. Plaintiff having been directed by defendant's foreman to obey the orders of a fellow-workman, it was his duty to obey, even though contrary to a rule adopted by the company, the violation of the rule thereupon not constituting a defense in an action by plaintiff for consequent injuries.—*Wallace v. Chicago, Milwaukee & P. S. Ry. Co.*, 345.

**Liability of Employer—Instructions.**

23. An instruction in the exact language of section 5244, Revised Codes, declaring that the employer must in all cases indemnify the employee for losses caused by the former's negligence, was properly given.—*Wallace v. Chicago, Milwaukee & P. S. Ry. Co.*, 345.

**Impairment of Earning Capacity—Instructions.**

24. In the absence of a request for a more specific instruction on the plan to be adopted in determining the damages suffered by plaintiff for impaired earning capacity, one in substance the same as that reviewed in *Bourke v. Butte etc. P. Co.*, 33 Mont. 267, was proper.—*Wallace v. Chicago, Milwaukee & P. S. Ry. Co.*, 345.

**What is not Contributory Negligence.**

25. Where plaintiff was ordered on a freight elevator by his foreman and vice-principal of his employer, and in obeying the command was injured, in the absence of evidence that the danger was apparent and so great that no reasonably prudent man would venture into it, he was not guilty of contributory negligence.—*Pascoe v. Nelson*, 405.

**Rules—Notice to Servant.**

26. If plaintiff did not know of a rule of his employers warning employees not to ride on a freight elevator, he could not be bound by it;

the mere publishing of a rule without insisting upon its observance being insufficient to discharge defendants' obligation in this respect.—*Pascoe v. Nelson*, 405.

**Release—Question for Jury.**

27. Whether payment by the employers of the plaintiff's doctor bills and his regular wages for the time he was incapacitated immediately after his injury was made and accepted as settlement and discharge of any claim which he had for damages arising from his injury, *held* for the jury under the conflicting evidence on the subject.—*Pascoe v. Nelson*, 405.

**Indemnity Against—Misconduct of Counsel.**

28. Where defendants voluntarily made known to the jury that their liability for injuries to their employees was insured against in an indemnity company, plaintiff's counsel cannot be said to have been guilty of misconduct in commenting upon, and making any legitimate deductions from, such evidence.—*Pascoe v. Nelson*, 405.

**Death in Natatorium—Negligence—Burden of Proof.**

29. In an action to recover damages for the death of a minor by drowning in defendant's natatorium, it was incumbent upon plaintiff administrator to make out a *prima facie* case of actionable negligence in favor of the deceased in his lifetime and against the defendant.—*Henroid v. Gregson Hot Springs Co.*, 447.

**Swimming-pools—Care Required by Owner—Minors.**

30. One who operates for profit a swimming-pool to which the public are invited, owes to patrons a duty which is measured by the standard of ordinary care proportionate to the risk to be apprehended and guarded against, a higher degree of care being due to a minor thirteen years old whom he knows cannot, than to one whom he knows can, swim.—*Henroid v. Gregson Hot Springs Co.*, 447.

**Same—Trespasser *Ab Initio*—Duty Owing to.**

31. If plaintiff's intestate secured admission to defendant's swimming-pool by representing to the person in charge that he could swim when in fact he could not, he became a trespasser *ab initio* to whom the defendant proprietor owed no duty other than to refrain from willfully or wantonly injuring him.—*Henroid v. Gregson Hot Springs Co.*, 447.

**Minimizing Damages—Duty of Plaintiff.**

32. Though one who has suffered a personal injury through the fault of another must use ordinary care and diligence to minimize the injurious consequences, he need not necessarily submit to a major operation, which may or may not result in a betterment of his condition; whether he has used such care is a question for the jury's decision.—*Stokes v. Long*, 470.

**Pain and Suffering—Limit of Recovery.**

33. In a personal injury action, plaintiff cannot recover compensation for future pain and suffering, and also the amount it would cost to obtain relief from it.—*Stokes v. Long*, 470.

**Theory of Case—Appeal.**

34. Where a personal injury case against a carrier was tried as though the latter's duty to provide safe conveyances was governed by the common law and without regard to section 5301, Revised Codes, it will be determined on appeal under the same theory.—*Batch v. Helena L. & Ry. Co.*, 517.

**Street Railways—Liability of Carrier—Erroneous Instructions.**

35. Instructions in an action by a passenger against a street railway company tried under the common law, that the carrier's responsibility for personal injuries due to defective appliances was confined to cases where such defects were visible or of long standing, and that respon-

sibility could be avoided by a showing that some sort of an inspection had been made by a person competent to make a proper one, were erroneous, the carrier under the common-law rule being liable for defects which a most rigid examination might disclose, and for the slightest negligence in this respect.—*Batch v. Helena L. & Ry. Co.*, 517.

Same—Liability of Carrier—Correct Statement of Law.

36. Where the jury were correctly instructed that proof of the accident to plaintiff caused by the breaking of a strap while the conductor was in the act of registering a fare by means of it, cast upon defendant company the burden of its exoneration; that it owed to plaintiff the highest degree of care; that such degree of care was required in the inspection of its equipment, including the strap, and keeping it in repair, and to anticipate all such results as might reasonably be expected in view of the conditions under which the equipment might be used, error in other instructions touching the liability of defendant was rendered harmless.—*Batch v. Helena L. & Ry. Co.*, 517.

Same—Inspection of Appliances—Insufficiency.

37. Inspection of a strap used by the conductor in a street-car for registering fares, made by looking at it without subjecting it to an actual test, was insufficient to relieve the railway company from liability for injuries caused to plaintiff by the breaking of the strap while being used by the conductor, and his consequent fall upon plaintiff. (MR. JUSTICE HOLLOWAY dissenting.)—*Batch v. Helena L. & Ry. Co.*, 517.

Railways—Interstate Commerce—What Constitutes.

38. The test to be applied for determining whether a trainman was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, when he was injured, is the nature of the work done by him at the time of the accident, and not the character of that performed immediately theretofore or that intended to be engaged in right after completion of his then present task.—*McBain v. Northern Pacific Ry. Co.*, 578.

Same—Interstate Commerce—What Does not Constitute.

39. The fact that the work performed by a trainman at the time he was injured had to do with interstate commerce to a much greater extent than with purely local shipments, held of no consequence in determining whether he then was engaged in interstate commerce.—*McBain v. Northern Pacific Ry. Co.*, 578.

Same—Interstate Commerce—Case at Bar.

40. A brakeman on a train the crew of which was engaged in handling both interstate and intrastate freight, having completed his run some hours before, and while on his way to the yard office for supplies needed on his caboose whenever it should be called into service, boarded a locomotive going in the direction of the office and was injured. He had not been called for duty; his train had not been made up, and his caboose was standing on a siding awaiting assignment. Held, that plaintiff was not at the time of his injury employed in interstate commerce.—*McBain v. Northern Pacific Ry. Co.*, 578.

## PHOTOGRAPHS.

See Evidence, 22.

## PHYSICIANS AND SURGEONS.

Malpractice—Complaint—Sufficiency.

1. A complaint stating that defendant physician, employed to treat plaintiff's broken leg, "failed to exercise ordinary care and skill," and so carelessly and negligently treated the fracture as to displace the

bones, causing shortening of the leg and pain, suffering and damages, and alleging in traversable form the acts or omissions of defendant on which recovery is sought, showing they occurred through defendant's negligence, is sufficient.—Stokes v. Long, 470.

Same—*Prima Facie* Case—Evidence—Sufficiency.

2. Evidence in an action against a physician for malpractice in the treatment of a broken leg, *held* to have made a *prima facie* case for the jury as to whether defendant exercised ordinary care and skill in selecting the means employed to produce a proper union.—Stokes v. Long, 470.

Same—Liability for Negligence of Recommended Physician.

3. If one physician, upon leaving his home temporarily, recommends to his patients, in case of need, some other physician who is not in any sense in his employment nor associated with him as a copartner, he is not liable for injuries resulting from negligence or want of skill in the latter, the employment in such case being under an independent contract and he alone responsible for the result.—Stokes v. Long, 470.

Same—Liability for Negligence of Associated Physician.

4. Where two physicians are employed on the same case and by agreement divide the service between them, and one observes and lets go on without objection wrongful acts and omissions by the other, or if the circumstances are such that he ought to have observed such wrongful acts or omissions, he is liable.—Stokes v. Long, 470.

Same.

5. A physician who called in another to assist him in treating a broken leg, giving the latter exclusive charge only upon leaving the city for an extended stay, and requesting the patient to retain his half of the fee, was liable in damages where the treatment was vicious from the beginning.—Stokes v. Long, 470.

Same—Minimizing Damages—Duty of Plaintiff.

6. Though one who has suffered a personal injury through the fault of another must use ordinary care and diligence to minimize the injurious consequences, he need not necessarily submit to a major operation, which may or may not result in a betterment of his condition; whether he has used such care is a question for the jury's decision.—Stokes v. Long, 470.

Same—Minimizing Damages—Cost of Operation—Evidence—Admissibility.

7. Evidence of the cost of an operation that would minimize plaintiff's suffering due to a vicious union of a broken leg, at the time of the trial, was admissible in an action against the physician for damages. (MR. CHIEF JUSTICE BRANTLY dissenting.)—Stokes v. Long, 470.

Same—Evidence—Course of Treatment by Associated Physician.

8. Evidence showing the course of treatment pursued by an associated physician for several weeks after defendant had left town, was competent to inform the jury that the course of treatment approved by defendant was continued without change, in order to rebut the notion that any efficient cause intervened by reason of anything such associated physician did upon his own initiative to bring about the condition in which plaintiff found himself at the conclusion of the treatment.—Stokes v. Long, 470.

X-ray Plates—Evidence—Admissibility.

9. X-ray plates—like photographs—if testified to as correct, are competent evidence to prove a condition which can be shown by such a representation; hence such plates showing the condition of plaintiff's leg at time of trial, were competent, they having been taken by practicing physicians who showed that they understood and were accus-

tomed to the use of X-ray process in their practice, and possessed the required skill and knowledge to use it with accurate results.—*Stokes v. Long*, 470.

### PLEADING AND PRACTICE.

See, also, Criminal Law.

#### False Imprisonment—Complaint—Sufficiency.

1. A complaint in an action for false imprisonment, alleging a violation of plaintiff's personal liberty and that such violation was without legal justification, was sufficient on attack by general demurrer.—*Slifer v. Yorath*, 129.

#### Fraud—Pleadings—Conclusions.

2. An allegation in answer to the complaint in an action on a promissory note that its date had been fraudulently changed by plaintiff was a mere conclusion, and insufficient to tender issue as to an intentional, material alteration, precluding recovery under section 5069, Revised Codes.—*McDonald v. Klenze*, 142.

#### Trial—Reading Court Opinion—Discretion.

3. Failure to excuse the jury while counsel, during the examination of a witness and over objection, read from the opinion of another court in another case, was not reversible error, in the absence of a showing of abuse of its discretion.—*In re Williams' Estate*, 192.

#### Trial—Directing Verdict—Rule.

4. No cause should be withdrawn from the jury, unless recovery cannot be had upon any view which may reasonably be drawn from the facts which the evidence tends to establish.—*Conway v. Monidah Trust*, 244.

#### Same—Undisputed Facts—Directing Verdict.

5. Where the facts in a personal injury action are undisputed and such that reasonable men can draw but one conclusion from them, the case presents in effect an agreed statement of facts, and only questions of law determinable by the court.—*Conway v. Monidah Trust*, 244.

#### Personal Injuries—Contributory Negligence—Demurrer.

6. A plea of contributory negligence may be coupled with a denial of primary negligence; hence it was error to sustain a demurrer to an answer so pleading, in an action for damages for the death of plaintiff's intestate alleged to have been caused by the negligent driving of an automobile.—*Lewis v. Steele*, 300.

#### Same—Demurrer—What not Harmless Error.

7. Error in sustaining a demurrer to the plea of contributory negligence, because coupled with a denial of negligence on defendant's part, thus rendering inadmissible any evidence on contributory negligence as a defense, *held* prejudicial, notwithstanding evidence suggesting contributory negligence was admitted during the trial and instructions on the subject were given.—*Lewis v. Steele*, 300.

#### Licenses—Itinerant Venders—Complaint—Sufficiency.

8. Complaint in an action to recover a license fee under Chapter 110, Laws 1911, the manifest import of which was that defendant, without first procuring a license, engaged in the business of itinerant vender, and in the business of soliciting orders, *held* sufficient to charge liability for the license as itinerant vender at least, and that therefore a demurrer to the pleading was properly overruled.—*State v. Turnmire*, 331.

#### Quieting Title—Injunction—Removal of School Building—Complaint—Sufficiency.

9. In a suit to quiet title to, and for an injunction against removing, a school building located on land deeded to defendant district, with the

condition that when abandoned for school purposes it should revert back to the grantor, complaint which alleged that defendant, with intent to abandon the premises, ceased to use them for school purposes, quit them and allowed plaintiff to re-enter, and that the district had offered the building for sale, *Held* sufficient, a technical abandonment not being necessary to plaintiff's suit.—*Hanf v. School District No. 1.* 395.

**Cities and Towns—Injunction—Police Officers—Physical Examination—Complaint—Insufficiency.**

10. The complaint of a city taxpayer which omitted to show that he was a police officer, or that he would suffer a special injury by a resolution of the council authorizing the appointment of a commission to make a physical examination of the members of the police force for the purpose of ascertaining whether any one of them had, by reason of old age or disease, become permanently incapacitated to discharge the duties of his office, was, under section 6643, Revised Codes, insufficient as a basis for an injunction to restrain the examination or the incurring of the expense incident to it.—*Larkin v. City of Butte*, 410.

**Unauthorized Expenditures—Complaint—Insufficiency.**

11. A complaint against a city alleging an unauthorized purchase of apparatus was insufficient to warrant an injunction in the absence of an averment that a claim in payment thereof had been presented to and allowed by the council.—*Larkin v. City of Butte*, 410.

**Real Property—Use and Occupation—Conversion—Complaint—Insufficiency.**

12. A complaint alleging defendant's occupancy and use of plaintiff's land, the value of its use, refusal to pay and that the defendant fed the hay raised thereon, but failing to aver acts which constituted a breach of contract or a civil wrong, was insufficient to state a cause of action.—*Elijah v. Wright*, 438.

**Pleading—Insufficient Complaint not Aided by Reply.**

13. Since the allegations of a reply are deemed by the statute to be denied, they cannot aid on insufficient complaint.—*Elijah v. Wright*, 438.

**Same—Writing—Presumptions.**

14. For the purposes of pleading, it will be presumed, in the absence of an allegation to that effect, that a lease was in writing, if a writing was necessary to its validity.—*Elijah v. Wright*, 438.

**Same—Amendment—When Refusal not Error.**

15. Where, if allowed, the defect in a complaint would not have been cured by an amendment offered during trial, its refusal was not error.—*Elijah v. Wright*, 438.

**Physicians and Surgeons—Malpractice—Complaint—Sufficiency.**

16. A complaint stating that defendant physician, employed to treat plaintiff's broken leg, "failed to exercise ordinary care and skill," and so carelessly and negligently treated the fracture as to displace the bones, causing shortening of the leg and pain, suffering and damages, and alleging in traversable form the acts or omission of defendant on which recovery is sought, showing they occurred through defendant's negligence, is sufficient.—*Stokes v. Long*, 470.

**Exceptions—Review—Statutes.**

17. *Held*, that Chapter 135, Laws of 1915, dispensing with the necessity of formal exceptions, governs the procedure in civil—not criminal—causes.—*State v. Lewis*, 495.

**Eminent Domain—Trial Practice—Right to Open and Close.**

18. *Quære*: Has the owner of land sought to be condemned the right to open and close on the question of damages?—*Interstate Power Co. v. Anaconda Copper Min. Co.*, 509.

**Same—Complaint—Description of Land—Sufficiency.**

19. Complaint in a condemnation suit which described the land by metes and bounds on three sides, and on the fourth merely designated a navigable river as the boundary, without stating that by the latter description the high or low water mark was meant, *held* sufficient to meet the requirement of section 4529, Revised Codes.—*Interstate Power Co. v. Anaconda Copper Min. Co.*, 509.

**Same—Area of Land.**

20. Under section 7337, Revised Codes, the area of the land sought to be acquired by condemnation proceedings is not required to be stated in the petition.—*Interstate Power Co. v. Anaconda Copper Min. Co.*, 509.

**Same—Unnecessary Allegations.**

21. Where plaintiff electric power company in a condemnation proceeding alleged sufficient facts to show that the use sought to be made of the land was a public one, it was not necessary to specifically allege that there was a present or prospective demand for its products.—*Interstate Power Co. v. Anaconda Copper Min. Co.*, 509.

**Juvenile Delinquents—Petition—Contents.**

22. The petition to have a juvenile delinquent committed under the provisions of Chapter 122, Laws of 1911, must, among other things, charge that the persons having the custody of the child are unfit, unwilling or unable to care for, educate, control or discipline it, or that their consent has been obtained that the delinquent might be taken from them.—*In re Satterthwaite*, 550.

**Same—Citation—Failure to Serve—Effect.**

23. The person from whose custody a child is intended to be taken under the Juvenile Delinquent Act must be made a party and receive notice by citation; failure to give it will render subsequent proceedings void.—*In re Satterthwaite*, 550.

**Breach of Contract—Material Variance—New Trial.**

24. The variance presented on the trial of an action for the breach of a contract of sale of cattle, in which plaintiff relied, not upon the contract as written, and set out in the complaint, but upon a modification thereof, not pleaded, to the effect that a portion of the cattle should be delivered at a place different from that originally agreed upon, at an additional cost to the seller, was such as may have prejudiced defendant, who was, therefore, entitled to a new trial.—*Ryan Co. v. Russell*, 596.

**Militia—Trespass—Destruction of Property—Civil Liability—Justification—Pleading.**

25. The defense in an action in trespass that, while engaged in restoring law and order in a city proclaimed by the governor to be in a state of insurrection, defendants, as officers of the organized state militia, were justified in having plaintiff's stock of liquors destroyed for an alleged infraction of a rule limiting their sale to certain hours, must be specially pleaded both at common law and under the Codes; in the absence of such pleading, evidence to show justification was inadmissible.—*Herlihy v. Donohue*, 601.

## POLICE OFFICERS.

See Cities and Towns, 15-17; False Imprisonment, 1-3.



## POLICE POWER.

Power to destroy private property,—see Cities and Towns, 9.

Surrender of—Constitution.

1. Though no specific provision of the Constitution forbids it, the legislature is without authority to surrender altogether the police power. Public Service Commission v. City of Helena, 527.

Cities and Towns.

2. However positive the terms of the grant of police power to a municipality, the state will be held to have retained its original jurisdiction over the same subject, and to possess the authority to exercise it concurrently with the municipality.—Public Service Commission v. City of Helena, 527.

State—Extent.

3. Under its police power, the state may regulate or control every act or thing within its jurisdiction which tends to subvert the government, to injure the public, to destroy the morals of the people, or to disturb the peace and good order of society.—Herlihy v. Donohue, 601.

## POLL TAXES.

See Taxation, 9-13.

## POWER OF SALE.

See Mortgages, 10, 12, 23.

## PRESCRIPTION.

Title by,—see Waters and Water Rights, 9.

## PRESUMPTIONS.

See, also, Taxation, 1; Banks and Banking, 1.

Good character,—see Instructions, 6.

Carrier and Passenger—Derailment—Jury Question.

1. The derailment of a railway car in which plaintiff was riding as a passenger, raised a presumption of negligence; a showing to the contrary by defendant presented a question for the jury.—Freeman v. Chicago, M. & St. P. Ry. Co., 1.

Same—Plaintiff may Rely on, When.

2. Where the record did not establish the cause of a derailment, plaintiff was not deprived of the presumption incident to the derailment. Freeman v. Chicago, M. & St. P. Ry. Co., 1.

Railroads—Killing of Livestock—Negligence.

3. Where the presumption of negligence on the part of a railroad company in the killing of livestock by one of its trains relied on by plaintiff (Rev. Codes, sec. 4309), is confronted with testimony of its train operatives that there was not any negligence on their part, the result is a conflict of evidence resolvable by the jury; hence a directed verdict in favor of defendant was properly refused.—Johnson v. Chicago, Milwaukee & St. P. Ry. Co., 73.

Criminal Law—Denial of Public Trial—Prejudice.

4. Where one accused of crime shows that he was denied a public trial contrary to the provision of section 16, Article III, of the Constitution, the law imputes prejudice.—State v. Keeler, 205.

Taxation—Validity.

5. Every presumption favors the validity of a tax collected from an owner of property, and before he can escape his full part of the burden imposed for state and local purposes, he must present facts disclosing

that the taxes had been paid and the lien fully discharged.—*Anaconda Copper Min. Co. v. Ravalli County*, 422.

**Pleading—Writing.**

6. For the purposes of pleading, it will be presumed, in the absence of an allegation to that effect, that a lease was in writing, if a writing was necessary to its validity.—*Elijah v. Wright*, 438.

**Appeal and Error.**

7. In entering upon its investigation of an appeal, the supreme court indulges the presumption that the ruling of the trial court is correct; and if its order directing a verdict of not guilty can be justified upon any ground, it will be upheld.—*State v. Rocky Mountain Elevator Co.*, 487.

**PRIMARY ELECTIONS.**

See Elections, 1.

**PRINCIPAL AND AGENT.**

Declarations of agent,—see Evidence, 9, 10.

Fraud in assignment of mortgage by agent,—see Mortgages, 26.

Fraud by agent—Ratification,—see State Lands, 5.

Privileged communication—Waiver,—see Evidence, 12.

Tort of agent,—see Telegraphs, 2.

**PRIVILEGED COMMUNICATIONS.**

Principal and agent,—see Evidence, 12.

**PROBATE PROCEEDINGS.**

**Wills—Trial.**

1. Where in a will contest the district court reserved its decision upon proponent's offer of it for probate and then after a jury trial, rendered judgment rejecting it, complaint that the offer was never passed upon was without merit.—*In re Williams' Estate*, 192.

**Same—Contest—Wealth of Beneficiary—Evidence—Admissibility.**

2. Evidence of the great wealth of the principal beneficiary under a will attacked for incapacity of the testatrix and undue influence, was admissible as tending to show an unnatural disposition of her property, it appearing that by it she practically disinherited her grandchild, who was her only near blood relation and for whom she had always manifested the greatest affection.—*In re Williams' Estate*, 192.

**Same—Finding—Inconsistency.**

3. A finding of want of testamentary capacity is not so far inconsistent with one of undue influence that both may not stand.—*In re Williams' Estate*, 192.

**Same—Appeal and Error—Burden on Appellant.**

4. Where the probate of a will was attacked on the grounds of want of publication, incapacity of the testatrix and undue influence, and a decree rendered based on findings sustaining all such grounds, appellants had the burden of showing that all the findings were erroneous, since the correctness of any one of them was sufficient to sustain the decree.—*In re Williams' Estate*, 192.

**PROCESS.**

Subpoena—County attorney may issue,—see Mandamus, 4.

**PROHIBITION.**

When issuance of writ not premature,—see Habeas Corpus, 3.

## PROMISSORY NOTES.

See Negotiable Instruments.

## PUBLIC LANDS.

See, also, State Lands.

## Effect of Entry.

1. So long as there is an existing entry of record, valid on its face, the land covered by it must be regarded as withdrawn from the public domain, and title to it cannot be initiated by a new entry or otherwise. *Pierce v. Chicago, Milwaukee & P. S. Ry. Co.*, 110.

## Patent—Title Relates to What Date.

2. Title to public lands acquired by an entryman through patent relates to the date of his entry.—*Pierce v. Chicago, Milwaukee & P. S. Ry. Co.*, 110.

## Entry—Cancellation—Conveyance to Railroad Before Patent—Title Acquired.

3. Prior to the cancellation of an entry on public land, defendant railway company had obtained a quitclaim deed to a strip thereof for right of way purposes from the entryman, filed a map of definite location of its line in the local land office, which was approved by the secretary of the interior, and constructed its road. After the cancellation, another person entered the land and secured patent. *Held*, in an action by the second entryman, that the railway company acquired title to the right of way strip, good as against plaintiff.—*Pierce v. Chicago, Milwaukee & P. S. Ry. Co.*, 110.

## PUBLIC SERVICE COMMISSION.

## Cities and Towns—Water Plants—Indebtedness—Powers.

1. The power exercised by a city under section 3259, subdivision 64, to issue bonds and procure, own and control a water system, is proprietary in character, as distinguished from its governmental capacity. *Public Service Com. v. City of Helena*, 527.

## Same—Water Plants—Control by State.

2. Where a city acquires a water supply without resort to indebtedness beyond the constitutional three per cent of the city's taxable property, it stands on an equal footing with an individual or private corporation engaged in furnishing water to it and its inhabitants, and is subject to all reasonable regulation and control by the state under the police power.—*Public Service Com. v. City of Helena*, 527.

## Same—Water Plants—Regulation by Public Service Commission.

3. A city which has acquired a water supply by resorting to the extended limit of indebtedness is not thereby exempted from control and regulation by the state through the agency of the Public Service Commission under Chapter 52, Laws of 1913.—*Public Service Com. v. City of Helena*, 527.

## Same—Water Plants—Indebtedness—Constitution.

4. Under the rule that, since the state Constitution limits, rather than grants, power, any provision of that instrument open to construction should be held to come within the general rule, unless a contrary conclusion is forced by the circumstances of the particular case, *held* that the provision of section 6, Article XIII, of the Constitution, relative to ownership and control of a water supply procured through resort to the extended limit of indebtedness, and application of revenue therefrom, must be understood as expressing constitutional restrictions imposed as a condition to the exercise of the privilege implied in the provision for extended indebtedness, and not as a grant of power not

enjoyed by a city acquiring a water system without incurring additional indebtedness.—Public Service Com. v. City of Helena, 527.

Same—Police Power.

5. However positive the terms of the grant of police power to a municipality, the state will be held to have retained its original jurisdiction over the same subject, and to possess the authority to exercise it concurrently with the municipality.—Public Service Com. v. City of Helena, 527.

Same—Public Service Commission—Constitution.

6. Chapter 52, Laws of 1913, creating a Public Service Commission and defining its powers, does not infringe the provision of section 36, Article V, of the Constitution, prohibiting the delegation of certain powers to special commissions, the Public Service Commission not being a "special commission" within the meaning of that section.—Public Service Com. v. City of Helena, 527.

Same—Water Rentals—Not Taxes.

7. Chapter 52, Laws of 1913 above, does not run counter to section 4, Article XII, of the Constitution, prohibiting the legislature from levying taxes for municipal purposes, no tax being actually levied by the commission and the regulation of water rentals not constituting a levy of taxes.—Public Service Com. v. City of Helena, 527.

Same—Public Service Commission—Regulations must be Reasonable.

8. Regulations made by the Public Service Commission must be reasonable in order to be valid, and any regulation which imposes upon a city an obligation which is invalid is not reasonable.—Public Service Com. v. City of Helena, 527.

Same—Water Plants—Constitution—"Revenues"—Definition.

9. The "revenues" referred to in section 6, Article XIII, of the Constitution, which must be devoted to a discharge of the indebtedness incurred in procuring the water system, are the net revenues,—the gross receipts less the necessary operating expenses,—against which the expense of regulation by the Public Service Commission, if reasonable, is chargeable.—Public Service Com. v. City of Helena, 527.

Same—Public Service Commission—Powers—How to be Construed.

10. Chapter 52, Laws of 1913, conferring authority upon the Public Service Commission, must be construed in harmony with the theory of self-government in cities and the retention of police power by the state. Public Service Com. v. City of Helena, 527.

Same—Water Plants—Control and Supervision.

11. Chapter 52 does not take away from a city the active management of its water plant or the authority to appoint or supervise the officers and employees necessary to operate it.—Public Service Com. v. City of Helena, 527.

#### PUBLIC TRIAL.

Defendant accused of crime entitled to public trial,—see Criminal Law, 5, 6.

#### QUIETING TITLE.

See, also, New Trial, 1.

Injunction—Removal of School Building—Complaint—Sufficiency.

1. In a suit to quiet title to, and for an injunction against removing, a school building located on land deeded to defendant district, with the condition that when abandoned for school purposes it should revert back to the grantor, complaint which alleged that defendant, with intent to abandon the premises, ceased to use them for school purposes, quit them and allowed plaintiff to re-enter, and that the district had offered the building for sale, held sufficient, a technical abandonment

not being necessary to plaintiff's suit.—*Hauf v. School District No. 1*, 395.

Same—Equity—Jurisdiction.

2. The district court had jurisdiction, under its equity powers, of a suit of the character mentioned in paragraph 1, *supra*.—*Hauf v. School Dist. No. 1*, 395.

Barred Mortgage.

3. Notwithstanding a mortgage had ceased to be a lien upon the property, it was a cloud upon the title thereto, because it was ostensibly a mortgage valid on its face and required extrinsic evidence to demonstrate that it was in fact of no force.—*Berkin v. Healy*, 398.

#### RAILROADS.

See, also, Personal Injuries, 1-5, 20-24, 38-40; Public Lands, 3; Taxation, 7.

Killing of Livestock—Negligence—Presumptions.

1. Where the presumption of negligence on the part of a railroad company in the killing of livestock by one of its trains relied on by plaintiff (*Rev. Codes, sec. 4309*), is confronted with testimony of its train operatives that there was not any negligence on their part, the result is a conflict of evidence resolvable by the jury; hence a directed verdict in favor of defendant was properly refused.—*Johnson v. Chicago, Milwaukee & St. Paul Ry. Co.*, 73.

#### RAPE.

See Criminal Law, 1-6.

#### RATIFICATION.

Fraud by agent,—see State Lands, 5.

#### REAL PROPERTY.

See, also, Mortgages; Waters and Water Rights; Animals.

Sales—Contract to Reconvey—Mortgages.

1. The owner of realty may sell it and receive back an agreement for a reconveyance the consideration for which is a pre-existing debt, without establishing the relation of mortgagor and mortgagee, the effect of the transaction—as to whether it constitutes a sale or a mortgage—depending upon the intention of the parties to be ascertained from the attendant circumstances.—*Dunne v. Yund*, 24.

Trespass—Actual or Constructive Possession of Land Sufficient.

2. Actual or constructive possession is sufficient to maintain an action of trespass on land.—*Coburn Cattle Co. v. Hensen*, 252.

Fixtures—What Constitutes.

3. In the absence of anything showing an intention to the contrary, things affixed to realty—such as buildings resting upon foundations imbedded in the soil—are part of the realty and pass with it; hence ownership of such a structure necessarily followed ownership of the land rightfully decreed to plaintiff.—*Hauf v. School Dist. No. 1*, 395.

Use and Occupation—Conversion—Complaint—Insufficiency.

4. A complaint alleging defendant's occupancy and use of plaintiff's land, the value of its use, refusal to pay and that the defendant fed the hay raised thereon, but failing to aver acts which constituted a breach of contract or a civil wrong, was insufficient to state a cause of action. *Elijah v. Wright*, 438.

## RECORD ON APPEAL.

Judgment-roll—Sufficiency,—see Appeal and Error, 15.

## REFORMATION OF INSTRUMENTS.

Mistake—Mutuality.

1. Suit to reform a deed does not lie where the alleged mistake in the description of the land was not mutual.—*R. M. Cobban Realty Co. v. Chicago etc. Ry. Co.*, 256

## RELEASE.

See Personal Injuries, 27.

## REMOVAL OF CAUSES.

Record on appeal,—see Appeal and Error, 8.

## REPLY.

As aid to insufficient complaint,—see Pleading and Practice, 13.

## RES ADJUDICATA.

See Judgments, 1.

## RESCISSION.

Acceptance of Benefits—Estoppel.

1. One who bought what at the time he deemed a right to make immediate homestead entry of public land, but which subsequently proved to be no more than a possessory right upon unsurveyed land, and with such knowledge entered the land as a homestead when declared open to settlement, made two partial payments under his agreement, and then, after expiration of two years, brought an action to rescind and recover back his payments, was, under section 5065, Revised Codes, not entitled to prevail.—*Hills v. Johnson*, 65.

## RULES.

Of employer,—see Personal Injuries, 21, 22, 26.

## RULES OF COURT.

Attorneys' fees,—see Costs, 2.

## SALES.

Of livestock,—see Contracts, 1.

Of municipal bonds,—see Contracts, 8-11.

Of realty with agreement for reconveyance—Effect,—see Real Property, 1.

## SCHOOLS AND SCHOOL DISTRICTS.

Removal of school building,—see Quieting Title, 1, 2.

## SEDUCTION.

Survival of action,—see Actions, 1.

## SHERIFFS.

Judgment—Assignment—Execution—Wrongful Payment of Proceeds.

1. After an abstract of judgment rendered in a justice's court had been filed in the district court, all claim to the proceeds thereof was

assigned for value; the assignee caused execution to be issued and the money due thereon was collected by defendant sheriff, who refused to pay it to the assignee but turned it over to the judgment creditor in an action against the assignor brought after the assignment had been made. *Held*, that the assignee was entitled to the money.—*Kitts v. Woods*, 569.

## SLANDER.

See Libel and Slander.

## SPECIAL IMPROVEMENT DISTRICTS.

See Cities and Towns, 10-15.

## STATE.

Appropriations,—see Constitutional Law, 12, 13, 16.

Police power,—see Police Power.

Power to exempt its officers from payment of fees,—see Mortgages, 19.

## STATE BOARD OF EXAMINERS FOR NURSES.

See Nurses, 1-5.

## STATE FIRE MARSHAL.

See Fire Marshal.

## STATE LANDS.

Control and Disposition of—Statutes Applicable.

1. *Held*, that Chapter 147, Laws of 1909, supersedes all prior and existing statutes having to do with the control and disposition of state lands.—*State ex rel. Danaher v. Miller*, 562.

Purchaser's Bond—Not Required.

2. A purchaser of state lands is not required to give bond to secure deferred payments of the purchase price.—*State ex rel. Danaher v. Miller*, 562.

Certificate of Purchase—Duty of Governor—*Mandamus*.

3. *Mandamus* lies to compel the governor, as president of the state board of land commissioners, to sign a certificate of purchase of state lands, his duty in this respect being a purely ministerial one.—*State ex rel. Danaher v. Miller*, 562.

Sale—Fraud—*Mandamus*—Jurisdiction.

4. The formal approval by the state board of land commissioners of a sale of state lands did not conclude the district court from investigating in a proceeding to compel by *mandamus* the issuance of a certificate of purchase, the question of fraud claimed to have entered into the sale.—*State ex rel. Danaher v. Miller*, 562.

Same—Principal and Agent—Ratification.

5. Under the rule that ratification of an unauthorized act has the effect of a prior authorization, *held* that a purchaser of state lands who, instead of repudiating her husband's conduct in stifling competition at the sale, with knowledge thereof endeavored to compel transfer of the land to her, ratified his act and became bound by it.—*State ex rel. Danaher v. Miller*, 562.

Fraud as to Part of Transaction—Effect.

6. Where two parcels of state lands were sold to the same person at the same sale, but separately as required by law, and fraud entered

into the sale of one only, the buyer was entitled to a certificate of purchase for the tract free from the taint of wrongdoing, and was properly denied relief as to the other.—State ex rel. Danaher v. Miller, 562.

## STATE MILITIA.

See Militia.

## STATUTE OF LIMITATIONS.

See Limitations of Actions; Mortgages, 20.

## STATUTES.

(List of Statutes of Montana Cited or Commented upon.)

## BANNACK STATUTES.

Page 356 .....	51
Page 121 .....	458
Page 430 .....	443

## LAWS OF 1867.

Page 163 .....	446
----------------	-----

## CODIFIED STATUTES OF 1871-72.

Page 220 .....	375
----------------	-----

## LAWS OF 1881.

Page 12 .....	376
---------------	-----

## COMPILED STATUTES OF 1887.

Section 250, First Division.....	446
Section 495, First Division.....	60
Sections 544, 545, First Division.....	217
Section 201, Fifth Division.....	51
Sections 1164 <i>et seq.</i> , Fifth Division.....	60
Sections 1000, 1003, Fifth Division.....	443, 444
Sections 1665-1795, Fifth Division.....	462
Section 1675, Fifth Division.....	463, 469

## LAWS OF 1891.

Page 73 (Revenues) .....	464, 574
--------------------------	----------

## LAWS OF 1893.

Page 65 (Poll Taxes) .....	575
----------------------------	-----

## POLITICAL CODE OF 1895.

Section 3718 .....	469
Section 5152 .....	51

## CIVIL CODE OF 1895.

Section 3735 .....	402
Section 3792 .....	402
Section 3842 .....	403

## LAWS OF 1905.

Page 62 (Cities and Towns) .....	20
----------------------------------	----

## REVISED CODES OF 1907.

Section 362 .....	375
Section 1068 .....	576
Section 2498 .....	425
Section 2501 .....	425



Sections 2502-2562 .....	465
Section 2510 .....	425, 426
Section 2528 .....	469
Section 2550 .....	426
Section 2669 .....	426
Section 2670 .....	426
Sections 2692-2714 .....	574 et seq.
Section 2714 .....	577
Section 2759 .....	394
Sections 2851-2856 .....	288
Section 2975 .....	507
Section 3052 .....	373
Sections 3052-3056 .....	375
Section 3116 .....	375
Section 3182 .....	141
Section 3214 .....	20 et seq.
Section 3259, subd. 64 .....	534
Section 3283 .....	413
Section 3287 .....	413
Sections 3304-3317 .....	412
Section 3305 .....	412
Section 3306 .....	412
Section 3308 .....	412
Section 3309 .....	412
Section 3314 .....	412
Section 3552 .....	48, 51
Section 3562, subd. 3 .....	591
Section 3603, subd. 1 .....	232
Section 3604 .....	236
Section 3694 .....	593
Section 3700 .....	392
Section 3735 .....	592
Sections 3897-3900 .....	344
Section 3899 .....	344
Section 3900 .....	344
Section 4309 .....	74
Section 4425 .....	397
Section 4427 .....	397
Section 4429 .....	43
Section 4529 .....	513
Section 4539 .....	594
Section 4684 .....	40
Section 4687 .....	40
Section 4726 .....	21
Section 4913 .....	434
Section 4995 .....	69
Section 4978, subd. 4 .....	593
Section 5018 .....	82
Section 5052 .....	323
Section 5065 .....	67, 69
Section 5067 .....	82
Section 5069 .....	146
Section 5244 .....	352
Section 5332 .....	321
Section 5361 .....	322
Section 5362 .....	322
Section 5373 .....	594
Section 5422 .....	568
Section 5709 .....	402

Section 5712 .....	160
Section 5715 .....	32, 240
Section 5723 .....	278
Sections 5723-5725 .....	240
Section 5728 .....	402 <i>et seq.</i>
Section 5746 .....	434
Section 5749 .....	403
Section 5750 .....	278
Section 5755 .....	109
Sections 5757-5773 .....	162
Section 5758 .....	162
Section 5766 .....	107, 108
Section 5771 .....	109
Sections 5842-6037 .....	364
Section 5850 .....	365
Section 5851 .....	364
Section 5900 .....	434
Section 5903 .....	435
Sections 5905-5907 .....	434
Section 6032 .....	364
Section 6047 .....	320, 322
Section 6121 .....	380
Section 6229 .....	42
Section 6270 .....	298
Section 6314 .....	297, 298
Section 6315, subd. 4 .....	58, 61
Section 6329 .....	290
Section 6402 .....	87
Section 6447 .....	14 <i>et seq.</i>
Section 6447, subd. 3 .....	116
Section 6449 .....	14 <i>et seq.</i> , 342, 344
Section 6451 .....	342, 344
Section 6472 .....	403
Section 6478 .....	434
Section 6494 .....	243
Section 6506 .....	459
Section 6507 .....	459
Section 6532 .....	477
Section 6534, subd. 2 .....	290
Section 6535 .....	291
Section 6540, subd. 2 .....	608
Section 6542, subd. 2 .....	434
Section 6585 .....	237, 512, 598
Section 6586 .....	598
Section 6587 .....	598
Section 6589 .....	31, 325
Section 6593 .....	230, 513
Section 6643 .....	412
Section 6746 .....	486
Section 6757 .....	144
Section 6758 .....	144
Section 6784 .....	337, 501
Section 6785 .....	512
Section 6788 .....	64, 65
Section 6794 .....	504
Section 6799 .....	476
Section 6806 .....	336
Sections 6813-6847 .....	240
Section 6814 .....	241

Section 6827	241
Section 6828	241
Section 6830	241
Section 6839	241
Section 6861	30 <i>et seq.</i>
Section 6877	278
Section 7140	299
Section 7158	368
Section 7165	154, 155
Section 7166	155
Section 7167	154, 155
Section 7169	141, 154, 155
Section 7196	95
Section 7206	458
Section 7309	48
Section 7331	515
Section 7337	514
Section 7718	368
Section 7767	64, 65
Section 7875	78
Section 7876	78
Section 7914	15, 34
Section 7917	15, 34
Section 8021	455
Section 8026	203, 237
Section 8028, subd. 2	3, 74
Section 8073	42
Section 8107	373
Section 8275	48 <i>et seq.</i>
Section 8324	132
Section 8417	370
Section 8663	87
Section 8664	87
Section 8671	87
Section 8992	374
Section 9005	374, 375
Section 9006	373
Section 9032	584
Section 9189	380
Section 9203	559
Section 9204	559, 560
Section 9271	501, 503
Section 9309	374, 376
Section 9323	190
Section 9329	190
Section 9330	191
Section 9340	501
Section 9346	501
Section 9347	501
Section 9350	504
Section 9415	584
Section 9486	557
Section 9548	584
Section 9630 <i>et seq.</i>	59

## LAWS OF 1909.

Chapter 114 (Disqualification of District Judges)	458
Chapter 147 (State Lands)	567 <i>et seq.</i>

## LAWS OF 1911.

Chapter 5 (Assault in First Degree).....	190
Chapter 110 (Itinerant Venders).....	332
Chapter 122 (Delinquent Children) .....	551 <i>et seq.</i>
Chapter 135 (Counties).....	288

## LAWS OF 1913.

Chapters 7 and 8 (Unfair Discrimination).....	491 <i>et seq.</i>
Chapter 27 (Renewal of Mortgages).....	404
Chapter 35 (Liquor Licenses).....	393 <i>et seq.</i>
Chapter 50 (Registration of Nurses).....	95 <i>et seq.</i>
Chapter 52 (Public Service Commission).....	534 <i>et seq.</i>
Chapter 79 (Fish and Game).....	584

## LAWS OF 1915.

Chapter 21 (Indeterminate Sentences) .....	190
Chapter 28 (Farm Loans) .....	380 <i>et seq.</i>
Chapter 96 (Workmen's Compensation) .....	7, 76 <i>et seq.</i>
Chapter 135 (Exceptions) .....	501

## STATUTES AND STATUTORY CONSTRUCTION.

See, also, Constitutional Law.

## Statutory Construction—Rule.

1. In the construction of statutes, every word thereof must be given some meaning if it is possible to do so.—*City of Butte v. Industrial Accident Board*, 75.

## Same.

2. Where one portion of a statute deals with the subject in hand in general terms, and another in a more minute and definite way, and the two are in apparent inconsistency with each other, they must be read together and harmonized, if possible.—*City of Butte v. Industrial Accident Board*, 75.

## Statutes—Constitutionality—Who may not Question.

3. One not prejudicially affected by unconstitutional clauses of a statute is not entitled to complain of its unconstitutionality.—*Hill v. Rae*, 378.

## Same—Partial Invalidity.

4. The insertion of a void provision in an Act otherwise valid does not render it inoperative as a whole unless the objectionable clause is indispensable to its operation or constituted the inducement to its enactment.—*Hill v. Rae*, 378.

## Same—Wisdom of Legislation.

5. In determining the constitutionality of a statute, the supreme court may not concern itself with the accuracy or wisdom of the view entertained by the legislature in enacting it.—*Hill v. Rae*, 378.

## Validity of Statute—Necessity for Determination.

6. The validity of a statute will not be determined on appeal unless such determination is necessary to a decision of the particular case.—*State v. Rocky Mountain Elevator Co.*, 487.

## Statutes—Constitutionality—Who may not Question.

7. One not affected by a statute will not be heard to question its constitutionality.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

## Same—Constitutionality—Rule.

8. In determining the constitutionality of statutes, courts look beyond the mere form of expression to the object and purpose of the legislation.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

## STREET RAILWAYS.

See Personal Injuries, 34-37.

## SUBPOENA.

See Process.

## SUPREME COURT.

Costs on appeal,—see Costs, 6.

Jurisdiction,—see Mandamus.

## SWIMMING-POOLS.

Death by drowning in,—see Personal Injuries, 29-31.

## TAXATION.

Increase in taxable property of county—Office and officers,—see Counties, 1.

Special assessments,—see Cities and Towns, 10-14.

"Public Purpose"—Constitution—Presumptions.

1. The question whether a particular purpose for which taxes may be levied and collected is a public one, under section 11, Article XII, Constitution, is for the legislature in the first instance, and courts will indulge every reasonable presumption in favor of the legislative decision in this respect.—*Lewis and Clark County v. Industrial Accident Board*, 6.

Real Property—Mineral and Other Reservations.

2. Where lands are sold with reservations to the grantor of the minerals therein and the right to mine the same, as well as of a right of way over them for mining purposes and for the removal of timber from adjoining lands, such reservations constitute property subject to taxation. *Anaconda Copper Min. Co. v. Ravalli County*, 422.

Double Taxation.

3. Where an assessor listed for taxation lands with the reservations of minerals, mining rights, etc., to the grantee for the full cash value, etc., and, at the same time, assessed the grantor's reservations at a certain amount per acre, there was a case of double taxation of the same property.—*Anaconda Copper Min. Co. v. Ravalli County*, 422.

Same—Who may Complain.

4. The only person who can complain of a double assessment is the one who is made to bear more than his proportion of the burden of taxation; therefore the former owner of the lands mentioned above, to whom the mineral and other reservations were properly assessed, was not in a position to complain of taxes unjustly exacted from his grantees on property belonging to it.—*Anaconda Copper Min. Co. v. Ravalli County*, 422.

Payment by Other Than Owner—Effect.

5. Before payment of A's taxes by B acts as a full discharge of B's obligation, it must have been made under such circumstances that it cannot be recovered back.—*Anaconda Copper Min. Co. v. Ravalli County*, 422.

Validity—Presumptions.

6. Every presumption favors the validity of a tax collected from an owner of property, and before he can escape his full part of the burden imposed for state and local purposes, he must present facts disclosing that the taxes had been paid and the lien fully discharged.—*Anaconda Copper Min. Co. v. Ravalli County*, 422.

**Railroads—Telegraph Lines—By Whom Assessable.**

7. So much of a telegraph line used exclusively for railroad purposes and extending along the right of way across the state, as is within any given county is assessable by its assessor, and not by the state board of equalization as part of the "roadway," under the mandate of section 16, Article XII, Constitution, that term including only the bare strip of ground upon which the rails are laid.—*Northern Pacific Ry. Co. v. Brogan*, 461.

**Cities and Towns—Water Rentals—Not Taxes.**

8. Chapter 52, Laws of 1913 above, does not run counter to section 4, Article XII, of the Constitution, prohibiting the legislature from levying taxes for municipal purposes, no tax being actually levied by the public service commission and the regulation of water rentals not constituting a levy of taxes.—*Public Service Com. v. City of Helena*, 527.

**Direct Taxes—United States Constitution.**

9. Sections 2 and 9, Article I, United States Constitution, which declare that if direct taxes are laid, they must be apportioned among the several states according to population, are limitations upon the power of Congress and have no application to the states; they could therefore not be looked to in support of an attack upon the statute imposing a poll tax (secs. 2692-2714, Rev. Codes).—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

**Poll Taxes—Constitution—Due Process of Law.**

10. The statute imposing a poll tax held not subject to the objection (sec. 1, 14th Amendment, U. S. Constitution) that in failing to provide for notices before the tax is levied and collected, it deprives the taxpayer of his property without due process of law.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

**Same—Exemption from—Constitution.**

11. Section 6, Article XII, of the state Constitution, forbidding the release of municipal corporations or their inhabitants from their proportionate share of state taxes, refers only to state taxes and not to those imposed for county or local purposes,—such as poll taxes.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

**Same—Nature of Imposition—Equal Protection of Laws.**

12. Held, that the statute imposing a poll tax is a police regulation designed to carry into effect the provision of section 5, Article X, of the Constitution, making it incumbent upon the counties of the state to care for their poor; that such an imposition is not a "tax" within the meaning of the Constitution and revenue measures generally, and therefore not subject to the uniformity rule or other restrictions incident to such measures.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

**Same—County Assessor may Collect.**

13. The legislature could properly provide that the county assessor should act as collector of poor funds in the shape of poll taxes, and in performing that duty such officer did not become a collector of taxes, contrary to constitutional provision.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 572.

## TELEGRAPHS.

See, also, Taxation, 7.

**Negligence in Transmission—Action on Contract or in Tort.**

1. One sustaining damage through the negligence of a telegraph company in transmitting or delivering a message may sue upon the contract if one exists between him and it, or waive the contract and sue in tort. *Lahood v. Continental Telegraph Co.*, 313.

**Tort of Agent—Punitive Damages—Liability of Company.**

2. A telegraph company may be made to respond in punitive damages for its agent's misconduct, even though the wrongful act was unauthorized and not ratified by it.—*Lahood v. Continental Telegraph Co.*, 313.

**Fraudulent Delay—Punitive Damages—Statutes.**

3. Where the element of fraud entered into the wrongdoing of a telegraph operator in withholding messages to and from a customer of his company, thus enabling him to profit by it, the provisions of section 6047, Revised Codes, awarding the right to punitive damages, governed, and section 5363, which allows the injured person \$50 in addition to his actual damages, did not.—*Lahood v. Continental Telegraph Co.*, 313.

**Repeating Messages—Applicability of Stipulation.**

4. The provision on a telegraph blank for repeating messages to avoid mistake has no application to a case in which damages are sought for fraudulent delay in transmission.—*Lahood v. Continental Telegraph Co.*, 313.

**Claims for Damages—Presentation of—Applicability of Stipulation.**

5. The stipulation on a telegraph blank that the company will not be liable for damages or statutory penalties where claim is not presented within sixty days after filing the message for transmission, applies only to claims arising from negligence, and not to one of the character mentioned above.—*Lahood v. Continental Telegraph Co.*, 313.

**THEORY OF CASE.**

Common law,—see Appeal and Error, 24.

Inconsistent theories—New trial,—see Appeal and Error, 6.

**TITLE.**

By prescription,—see Waters and Water Rights, 9.

Proof of, in action for trespass on land,—see Animals, 6.

**TRESPASS.**

See Animals, 1-6; Militia, 1-6; Mines and Mining, 4; Personal Injuries, 31.

**TRUSTS.****Trusts *ex Maleficio*—Husband and Wife—Real Property Conveyance—Breach of Condition.**

1. Where a wife's intention to convey property owned by her in her own right to an only daughter, was, through the influence of the husband, made possible by reason of the confidential relations between them, so changed as to cause her to convey to him instead, upon his promise to make a will devising such property as well as his own to the daughter and a son in equal shares, which promise was after the wife's death broken and the will, theretofore made, destroyed, the husband was rightfully declared an involuntary trustee of the property, in favor of the daughter, the intended beneficiary.—*Huffine v. Lincoln*, 585.

**Same—Proper Party Plaintiff.**

2. The daughter who, but for the conduct of her father, would have become the owner of her mother's property, was, under section 5373, Revised Codes, the real party in interest and, therefore, entitled to maintain suit to have the father declared an involuntary trustee in her favor.—*Huffine v. Lincoln*, 585.

**Same—Decree Declaring Trust—Who may not Complain.**

3. The intention of the deceased wife having been to convey to her daughter alone, the son who was entitled to share in the mother's prop-

erty only in the event the husband carried out his promise to make and keep effective the will in favor of both daughter and son, and who made common cause with the father in his endeavor to defeat the claim of the daughter, was not aggrieved by the decree declaring the father an involuntary trustee in the daughter's favor.—*Huffine v. Lincoln*, 585.

Husband and Wife—Dower—Trust Property.

4. Generally speaking, a wife has no dower in trust property or in estates lost by breach of condition.—*Huffine v. Lincoln*, 585.

#### UNDERTAKINGS.

See Bonds and Undertakings.

#### UNFAIR DISCRIMINATION.

In buying commodities,—see Criminal Law, 8.

#### USE AND OCCUPATION.

See Real Property, 4.

#### VARIANCE.

When material,—see Pleading and Practice, 24.

#### VENDOR AND PURCHASER.

See Real Property; Waters and Water Rights.

#### VERDICTS.

Banks and Banking—Wrongful Dishonoring of Check—Excessive Verdict.

1. Where a bank through mistake dishonored a trading customer's check, but upon discovery of the mistake notified the payee and paid it with costs of protest, and plaintiff showed neither malice on the bank's part nor actual damage, a verdict for \$500 *held* excessive, and scaled to \$200.—*Crites v. Security State Bank*, 121.

Promissory Notes—Responsiveness to Issues.

2. In an action to recover on two promissory notes, the defense to one of which was payment, and want of consideration as to the other, a general verdict in a lump sum, *held* to have been responsive to both issues.—*McDonald v. Klenze*, 142.

Compromise—Verdict—Finding in Favor of Appellant—Right to Complain.

3. Where the jury in an action on promissory notes awarded plaintiff much less than they might have done, defendant was not in a position to complain that under the pleadings and evidence plaintiff should either have recovered the whole amount sued for or nothing, and hence that the verdict must have been reached by a compromise and should not be allowed to stand.—*McDonald v. Klenze*, 142.

Appeal and Error—Conflict in Evidence—Verdict Conclusive.

4. Where the evidence on the question at issue was conflicting, the verdict of the jury will not be disturbed on appeal.—*Stone v. Maynard*, 147.

Directing Verdict—Rule.

5. No cause should be withdrawn from the jury, unless recovery cannot be had upon any view which may reasonably be drawn from the facts which the evidence tends to establish.—*Conway v. Monidah Trust*, 244.

Same—Undisputed Facts.

6. Where the facts in a personal injury action are undisputed and such that reasonable men can draw but one conclusion from them, the



case presents in effect an agreed statement of facts, and only questions of law determinable by the court.—*Conway v. Monidah Trust*, 244.

**Impeachment—Affidavits of Jurors.**

7. Except in cases where it has been reached by means other than a fair expression of opinion by all the jurors, their verdict cannot be impeached by the affidavit of one or more of the individuals composing the jury.—*State v. Lewis*, 495.

**Conclusiveness—Eminent Domain.**

8. A verdict in a condemnation suit which was based upon a substantial conflict in the evidence and was well within the extremes fixed by the different witnesses, and which was approved by the trial court in denying appellants' motion for a new trial, will be accepted as conclusive on appeal.—*Interstate P. Co. v. Anaconda C. Min. Co.*, 509.

#### WAIVER.

**Privileged communications,—see Evidence, 12.**

#### WANT OF PROBABLE CAUSE.

**See Malicious Prosecution, 1.**

#### WATER PLANTS.

**Control over,—see Public Service Commission, 1-11.**

#### WATERS AND WATER RIGHTS.

**See, also, Corporations, 1, 2.**

**Water Rights—Deeds—Loss—Evidence—Sufficiency.**

1. Evidence in a water right suit *held* sufficient to show the conveyance of the right by deed claimed to have been lost.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same—Recordation of Deeds—Presumptions.**

2. Under section 4684, Revised Codes, making any unrecorded conveyance void as against subsequent purchasers or encumbrancers, it is presumed that the holder of the prior recorded title acquired the entire estate, unless he had, or was chargeable with, notice.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same—Vendor and Purchaser—Unrecorded Deed—Constructive Notice.**

3. A use of water for mill and smelter purposes, through a ditch and pipe-line which were prominent, open and visible to any person passing along the ditch, was sufficient to put a purchaser upon notice; the burden of establishing such use being upon the claimant.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same—Constructive Notice—Evidence—Sufficiency.**

4. Evidence *held* insufficient to establish constructive notice in defendant city of an unrecorded grant of a portion of a water right made prior to its purchase of the entire right by defendant.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same—Possession—Notice of Unrecorded Grant.**

5. Possession of real property or a water right which will amount to notice of an unrecorded grant thereof must be under such grant, unequivocal, inconsistent with the title of the apparent owner of record, and of such a character that an intending purchaser could, by making inquiry, learn of the unrecorded grant.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same—Appurtenances—Deed—Burden of Proof.**

6. In order that a deed conveying land with appurtenances may convey a water right, such right must have been appurtenant to the land at the time of the conveyance, and the burden of showing such to have been the fact was upon the grantee.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same—Appurtenances—Conveyances.**

7. Where a water right was not granted for any certain purpose or for use on any particular land, it did not become an appurtenance by the terms of the deed, and could not thereafter be conveyed as an appurtenance unless the grantee had given it that character by using it with, and for the benefit of, the land.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same.**

8. Evidence held insufficient to show that a water right conveyed by deed was thereafter so used in connection with certain lands as to become appurtenant thereto and pass by mere general deed of the land and its appurtenances.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Same—Title by Prescription—Evidence—Insufficiency.**

9. Under the rule that, to maintain title to a water right by prescription, the grantee must prove that for ten years the right or some definite portion thereof was in his possession or that of his grantors, and that such possession was open, notorious, exclusive and adverse to the claim of the defendant and under a claim of right, the evidence held insufficient to support such a title.—*Custer Con. Mines Co. v. City of Helena*, 35.

**Water Right by Appropriation—Is Property.**

10. A water right acquired by appropriation is property which at the death of the appropriator passes to his successor.—*Moore v. Sherman*, 542.

**Abandonment—What Constitutes.**

11. Abandonment of a water right, being a matter of intention, cannot exist in the absence of an intention to abandon.—*Moore v. Sherman*, 542.

**Nonuser—Effect.**

12. Nonuser of a water right for the period of the statute of limitations does not constitute abandonment of it.—*Moore v. Sherman*, 542.

**Abandonment—Estoppel.**

13. To uphold S.'s contention that P., the owner of a water right, was estopped to claim the right or to say that there was no intention on her part to abandon it, some representations must have been made or some position assumed by the latter upon which the former, having a right to do so, relied in good faith, and from which inequitable consequences must flow if the representations be repudiated or the position be changed.—*Moore v. Sherman*, 542.

**Estoppel by Silence.**

14. Before silence alone can work an estoppel, the person to be estopped must have had an intent to mislead or a willingness that another should be deceived, and the latter must have been misled by the silence.—*Moore v. Sherman*, 542.

**Same.**

15. Where no legal obligation rested upon a prior appropriator to make known his claim to a water right which he did not use, an estoppel cannot be claimed by a subsequent appropriator, even though he was injured by the recognition of the former right.—*Moore v. Sherman*, 542.

**Subsequent Appropriation—Notice of Adverse Claim.**

16. A subsequent appropriation of water is not any notice of an adverse claim.—*Moore v. Sherman*, 542.

**WILLS.**

See Probate Proceedings.

**WITNESSES.**

Expert witnesses,—see Evidence, 20.

Impeachment,—see Evidence, 5.

Power to issue subpoena,—see County Attorneys, 6.

Costs—Mileage.

1. The mileage of witnesses in civil actions allowed litigants by sections 7169 and 3182, Revised Codes, is limited to travel within the state. *Chilcott v. Bea*, 134.

**WORDS AND PHRASES.**

"Abandonment" of water right —  
*Moore v. Sherman*, 545.

"Any employer"—(Chap. 96, Laws 1915.)  
*City of Butte v. Industrial Accident Board*, 78.

"Automobile"—  
*Lewis v. Steele*, 309.

"Common carrier"—(Rev. Codes, sec. 5332.)  
*Lahood v. Continental Tel. Co.*, 321.

"Contempt"—  
*State ex rel. Metcalf v. District Court*, 49.

"Costs and charges"—  
*Donovan v. Jenkins*, 127.

"Equity of redemption"—  
*The Banking Corporation v. Hein*, 240.

"Every employer"—(Chap. 96, Laws 1915.)  
*City of Butte v. Industrial Accident Board*, 78.

"Extralateral rights"—  
*Anaconda C. M. Co. v. Pilot-Butte M. Co.*, 178.

"False imprisonment"—  
*Slifer v. Yorath*, 132.

"Faro lay-out"—  
*State v. Williams*, 370.

"Habeas corpus"—  
*State ex rel. Brandegee v. Clements*, 59.

"Holding court"—(Const., Art. VIII, sec. 12.)  
*Eustance v. Francis*, 299.

"Lay-out" in faro game—  
*State v. Williams*, 370.

- "Legal capacity to sue"—(Rev. Codes, sec. 6534, subd. 2.)  
Poe v. Sheridan County, 290.
- "Negotiable promissory note"—  
First Nat. Bank v. Barrett, 364.
- "Poll taxes"—(Rev. Codes, secs. 2692-2714.)  
Pohl v. Chicago etc. Ry. Co., 576 *et seq.*
- "Public"—(Const., Art. XII, sec. 11.)  
Lewis & Clark County v. Industrial Accident Board, 12.
- "Public office"—  
State ex rel. Scollard v. Board of Examiners, 95.
- "Public trial"—  
State v. Keeler, 214 *et seq.*
- "Reasonable doubt"—  
State v. Lewis, 502.
- "Revenues"—(Const., Art. XII, sec. 6.)  
Public Service Commission v. City of Helena, 541.
- "Right of redemption"—  
The Banking Corporation v. Hein, 241.
- "Roadway"—(Const., Art. XII, sec. 16.)  
Northern Pac. Ry. Co. v. Brogan, 463 *et seq.*
- "Settlement" of bill of exception—  
State ex rel. Lindsey v. Ayers, 64.
- "Sum" of money—  
Donovan v. Jenkins, 127.
- "Telegraph companies"—  
Lahood v. Continental Tel. Co., 321.
- "Workingmen's insurance and compensation laws"—  
Lewis and Clark County v. Industrial Accident Board, 10.
- "Workmen"—(Chap. 96, Laws 1915.)  
Lewis and Clark County v. Industrial Accident Board, 11.

## WORKMEN'S COMPENSATION.

- Counties—Workmen's Compensation Act—Constitution—Sufficiency of Title.
1. *Held*, that the Workmen's Compensation Act (Chap. 96, Laws 1915) applies to counties and county employees, the contention that its title is insufficient to warrant their inclusion in the body of the measure, under section 23, Article V, of the Constitution, being untenable.—Lewis and Clark County v. Industrial Accident Board, 6.
- Same—Constitution—Class Legislation—Donations.
2. *Held*, further, that the Act above, as applied to county employees, is neither obnoxious as class legislation, nor in violation of the constitutional prohibition against donations to individuals.—Lewis and Clark County v. Industrial Accident Board, 6.
- Same—Taxation—"Public Purpose"—Constitution.
3. The question whether a particular purpose for which taxes may be levied and collected is a public one, under section 11, Article XII, Constitution, is for the legislature in the first instance, and courts will

indulge every reasonable presumption in favor of the legislative decision in this respect.—*Lewis and Clark County v. Industrial Accident Board*, 6.

Same.

4. Taxes levied to provide a fund to be devoted to the relief of injured employees of a county which is subject to the provisions of the Workmen's Compensation Act, *held* to be for a public purpose, and therefore not obnoxious as offending against the provision of section 11, Article XII, of the Constitution.—*Lewis and Clark County v. Industrial Accident Board*, 6.

Act—Compulsory as to Cities.

5. *Held*, that plan No. 3 provided by the Workmen's Compensation Act (Laws 1915, Chap. 96, p. 168) is, as to a city, exclusive, compulsory and obligatory upon both employer and employee.—*City of Butte v. Industrial Accident Board*, 75.

#### WRITINGS.

Pleading,—see Presumptions, 6.

#### X-RAY PLATES.

See Evidence, 22.



## TABLE OF MONTANA CASES CITED—VOL. 52.

Alexander v. Great Northern Ry. Co., 51 Mont. 565.....	582
(Railroads—Personal Injuries—Interstate Commerce.)	
Allen v. Bear Creek Coal Co., 43 Mont. 269.....	5, 483
(Personal Injuries—Minimizing Damages.)	
Andree v. Anaconda C. M. Co., 47 Mont. 554.....	4
(Personal Injuries—Quantum of Proof Required.)	
Bank of Commerce v. Fuqua, 11 Mont. 285.....	155
(Counsel Fees—Costs.) COMMENTED UPON.	
Barnard Realty Co. v. City of Butte, 50 Mont. 159.....	23
(Taxpayers' Actions.)	
Beach v. Spokane R. & W. Co., 25 Mont. 379.....	291
(Parties—Demurrer.)	
Beck v. Beck, 6 Mont. 318.....	444, 445
(Divorce—Jury Trial.)	
Beller v. Le Boeuf, 50 Mont. 192.....	409
(New Trial—Conflicting Affidavits.)	
Black v. Black, 5 Mont. 15.....	444
(Divorce—Jury Trial.)	
Blankenship v. Decker, 34 Mont. 292.....	230
(Harmless Error—New Trial.)	
Bordeaux v. Bordeaux, 32 Mont. 159.....	276
(Deeds Absolute—Mortgages—Evidence.)	
Borden v. Lynch, 34 Mont. 503.....	337
(Record on Appeal—Authentication.)	
Bourke v. Butte etc. Co., 33 Mont. 267.....	352
(Personal Injuries—Earning Capacity—Instructions.)	
(Same—Duty of Defendant).....	455
Braithwaite v. Harvey, 14 Mont. 208.....	403
(Part Payment—Effect.)	
Brophy v. Idaho P. & P. Co., 31 Mont. 279.....	420
(Contracts—Offer and Acceptance.)	
Burles v. Oregon S. L. Ry. Co., 49 Mont. 129.....	322
(Agency—Liability of Principal.)	
Cadle v. Town of Baker, 51 Mont. 176.....	290
(County Seat Elections—"Contests.")	
(Mandamus).....	292
Callahan v. Chicago, M. & St. P. Ry. Co., 47 Mont. 401.....	234
(Principal and Agent—Declarations.)	
Capell v. Fagan, 30 Mont. 507.....	39
(Real Property—Lost Deeds—Proof.)	
Carlson v. City of Helena, 43 Mont. 1.....	45
(Water Rights— <i>Res Adjudicata</i> .)	
Chessman v. Hale, 31 Mont. 577.....	554
(Jury Trial.)	
Chumasero v. Potts, 2 Mont. 242.....	291, 380, 567
(Mandamus.)	
City of Butte v. Goodwin, 47 Mont. 155.....	453, 492
(Appeal—Correct Result—Wrong Reason.)	
City of Helena v. Kent, 32 Mont. 279.....	19
(Cities and Towns—Powers.)	

700      TABLE OF MONTANA CASES CITED—VOL. 52.

City of Lewistown v. Warr, 52 Mont. 353.....	356
(Cited.)	
Colusa-Parrott etc. Co. v. Barnard, 28 Mont. 11.....	154
(Costa.)	
Colvill v. Fox, 51 Mont. 72.....	385
(Police Power.)	
Conway v. Monidah Trust, 47 Mont. 269.....	247
(Cited.)	
Cooper v. Romney, 49 Mont. 119.....	236
(Libel—Privileged Publication.)	DISTINGUISHED.
Copenhaver v. Northern Pac. Ry. Co., 42 Mont. 453.....	513
(Appeal—Harmless Error.)	
(Expert Witnesses).....	338
Consolidated G. & S. M. Co. v. Struthers, 41 Mont. 565.....	443
(Jury Trial—Constitution.)	
Cornish v. Woolverton, 32 Mont. 456.....	277, 434
(Mortgages.)	
(Promissory Notes—Negotiability.)	DISTINGUISHED.....
County of Silver Bow v. Davies, 40 Mont. 418.....	478
(Complaint—Sufficiency.)	
Crites v. Security State Bank, 52 Mont. 121.....	330
(Banks—Unlawful Dishonoring Check.)	
Cummings v. Helena etc. Co., 26 Mont. 434.....	251
(Contributory Negligence.)	
Cunningham v. Northwestern Imp. Co., 44 Mont. 180.....	386
(Constitution—Classification.)	
(Taxation—Public Purpose—Constitution).....	13
(Jury Trial).....	443
Davenport v. Kleinschmidt, 6 Mont. 502.....	19
(Cities and Towns—Powers.)	
Day v. Kelly, 50 Mont. 306.....	307
(Contributory Negligence—Pleading.)	
Downs v. Cassidy, 47 Mont. 471.....	232
(Libel—Malice—Evidence.)	
(Same—Repetition of Charge—Effect).....	236
De Sandro v. Missoula L. & W. Co., 48 Mont. 226.....	335
(Cited.)	
Doornbos v. Thomas, 50 Mont. 370.....	476
(Record on Appeal—Authentication.)	
Dunseth v. Butte El. Ry. Co., 41 Mont. 14.....	15, 34
(Res Judicata.)	
Egan v. Mont. C. Ry. Co., 24 Mont. 569.....	456
(Personal Injuries—Trespassers.)	
Emerson v. Butte El. Ry. Co., 46 Mont. 454.....	74
(Conflict in Evidence—Conclusive Verdict.)	
Evers v. Hudson, 36 Mont. 135.....	12
(Statutes—Title—Constitution.)	
Farleigh v. Kelley, 28 Mont. 421.....	199
(Will Contests—Procedure.)	
Farlin v. Hill, 27 Mont. 27.....	21
(Cities and Towns—Additions.)	
Featherman v. Hennessy, 42 Mont. 535.....	41
(Water Rights—Prescription.)	
(Same—Adverse Use).....	44
(Same—Nonuser—Abandonment).....	546



Ferris v. McNally, 45 Mont. 20.....	368
(Costs—Part of Judgment—Review.)	
First Nat. Bank v. Bell S. & C. Min. Co., 8 Mont. 32.....	404
(Mortgages—Power of Sale.)	
First Nat. Bank v. Cottonwood L. Co., 50 Mont. 544.....	243
(Survival of Actions.)	
Fitzgerald v. Clark, 17 Mont. 100.....	183, 184
(Mining Claims—Rights of Locator.)	
Ford v. Drake, 46 Mont. 314.....	82
(Varying Terms of Written Contract.)	
Freeman v. Chicago, M. & St. P. Ry. Co., 52 Mont. 1.....	74
(Conflict in Evidence—Verdict Conclusive.)	
(Personal Injuries—Minimizing Damages).....	484
Gaffney Merc. Co. v. Hopkins, 21 Mont. 13.....	262
(Reformation of Instruments.)	
Gallagher v. Basey, 1 Mont. 457.....	446
(Equity—Jury Trial.)	
Gassert v. Bogk, 7 Mont. 585.....	33, 276
(Mortgages—Sales Absolute.)	
Gauss v. Trump, 48 Mont. 92.....	478
(Complaint—Sufficiency.)	
Golden v. Northern Pac. Ry. Co., 39 Mont. 435.....	336
(Removal of Causes—Petition—Bill of Exceptions.)	
Graham v. Gt. Falls etc. Co., 30 Mont. 393.....	118
(Public Lands—Entry.)	
Grogan v. Valley Trading Co., 30 Mont. 229.....	33
(Real Property—Mortgages—Sales Absolute.)	
Grorud v. Losal, 48 Mont. 274.....	321
(Agency—Liability of Principal.)	
Hamilton v. Hamilton, 51 Mont. 509.....	240
(Mortgages—Redemption.)	
Harrington v. Butte etc. Ry. Co., 37 Mont. 169.....	250
(Parent and Child—Negligence.)	
Hardesty v. Largey Lumber Co., 34 Mont. 151.....	352
(Master and Servant—Liability of Former.)	
Helena Con. Water Co. v. Steele, 20 Mont. 1.....	534, 541
(Cities and Towns—Water Plants.)	
Helena & L. S. & R. Co. v. Lynch, 25 Mont. 497.....	516
(When Verdict Conclusive.)	
Helena etc. Ry. Co. v. City of Helena, 47 Mont. 18.....	19
(Cities and Towns—Powers.)	
Helena L. & Ry. Co. v. City of Helena, 47 Mont. 18.....	537
(Cities and Towns—Police Power.)	
Helena Nat. Bank v. Rocky Mt. B. Tel. Co., 20 Mont. 379.....	250
(Nonsuit.)	
Helena Power T. Co. v. Spratt, 35 Mont. 108.....	514, 515
(Eminent Domain—Public Use.)	
Herrin v. Sieben, 46 Mont. 226.....	138
(Livestock—Trespass.)	
Holland v. Board of Commissioners, 15 Mont. 460.....	277
(Mortgages.)	
Hoskins v. Northern Pac. Ry. Co., 39 Mont. 394.....	3
(Carrier and Passenger—Presumption of Negligence.)	
Hotchkiss v. Marion, 12 Mont. 218.....	7
(Legislative Procedure.)	
Hull v. Diehl, 21 Mont. 71.....	41
(Water Rights—Prescriptive Use—Burden of Proof.)	

702      TABLE OF MONTANA CASES CITED—VOL. 52.

In re Boyle, 26 Mont. 365.....	191
( <i>Habeas Corpus.</i> )	
In re Lewis, 51 Mont. 539.....	191
( <i>Habeas Corpus.</i> )	
In re Mettler, 50 Mont. 299.....	48
( <i>Contempt—Power of District Court.</i> )	
In re Murphy's Estate, 43 Mont. 353.....	199
( <i>Will Contests—Procedure.</i> )	
( <i>Same—Inconsistent Findings.</i> )	204
In re Ryan, 46 Mont. 289.....	101
( <i>Cited.</i> )	
In re Thompson, 9 Mont. 381.....	191
( <i>Habeas Corpus.</i> )	
In re Williams' Estate, 50 Mont. 142.....	198, 199
( <i>Wills—Contests—Procedure.</i> )	
( <i>Cited.</i> )	368
Jenkins v. Carroll, 42 Mont. 302.....	22
( <i>Judgments—Collateral Attack.</i> )	
( <i>Cited.</i> )	126
Johnston v. Lewis & Clark County, 2 Mont. 159.....	375
( <i>Attorneys—Compensation.</i> )	
Kennedy v. Dickie, 34 Mont. 205.....	34
( <i>Fraud—Pleading and Proof.</i> )	
( <i>Res Judicata.</i> )	35
Kennedy v. The Grand Fraternity, 36 Mont. 325.....	547
( <i>Estoppel.</i> )	
Kerr v. Blaine, 49 Mont. 602.....	241
( <i>Judicial Sales.</i> )	
King v. Amy & Silversmith Co., 9 Mont. 543.....	187
( <i>Mining Claims—Extralateral Rights.</i> )	
Kinsel v. North Butte Min. Co., 44 Mont. 445.....	251
( <i>Negligence—Custom.</i> )	
Kleinschmidt v. Dunphy, 1 Mont. 118.....	446
( <i>Equity—Jury Trial.</i> )	
Knight v. Le Beau, 19 Mont. 223.....	290
( <i>Capacity to Sue—Special Demurrer.</i> )	
Kroeger v. Passmore, 36 Mont. 504.....	132
( <i>False Imprisonment.</i> )	
Latimer v. Nelson, 47 Mont. 545.....	336, 337
( <i>Record on Appeal.</i> )	
Lewis v. Northern Pac. Ry. Co., 36 Mont. 207.....	5
( <i>Personal Injuries—Excessive Verdicts.</i> )	
Lewis v. Lindley, 19 Mont. 422.....	595
( <i>Trusts—Notice.</i> )	
Lokowich v. City of Helena, 46 Mont. 575.....	34, 45
( <i>Res Adjudicata—Parties Bound.</i> )	
McCormick v. Hubbell, 4 Mont. 87.....	31
( <i>Equity.</i> )	
McKay v. McDougal, 19 Mont. 488.....	255
( <i>Trespass.</i> )	
Mahoney v. Dixon, 34 Mont. 454.....	202
( <i>Reading Court Opinion to Jury.</i> )	
Marron v. Great Northern Ry. Co., 46 Mont. 593.....	492
( <i>Appeal—Presumptions.</i> )	
Martin v. Corscadden, 34 Mont. 308.....	132
( <i>False Imprisonment—Exemplary Damages.</i> )	

Mattock v. Goughnour, 11 Mont. 265.....	276
(Evidence—Weight.)	
Maxey v. Cooper, 21 Mont. 456.....	427
(Justices' Courts—Judgment by Default—Appeal.)	
Melzner v. Northern Pac. Ry. Co., 46 Mont. 162.....	243
(Survival of Actions.)	
Middle Creek Ditch Co. v. Henry, 15 Mont. 558.....	545
(Water Rights—Abandonment.)	
Middlefork Cattle Co. v. Todd, 49 Mont. 259.....	409
(New Trial—Conflicting Affidavits.)	
Milligan v. Miles City, 51 Mont. 374.....	534
(Cities and Towns—Water Plants—Public Ownership.)	
Mills v. Olsen, 43 Mont. 129.....	155
(Costs.)	
Monahan v. Allen, 47 Mont. 75.....	420
(Contracts—Offer and Acceptances.)	
Montana El. Co. v. Northern V. M. Co., 51 Mont. 266.....	397
(Fixtures.)	
Montana L. & P. Co. v. Howard, 10 Mont. 296.....	64
(Bills of Exception—Settling—Signing.)	
Montana O. P. Co. v. Boston etc. Co., 27 Mont. 288.....	154
(Costs.)	
Montana O. P. Co. v. Boston etc. Co., 27 Mont. 536.....	445
(Jury Trial.)	
Montana O. P. Co. v. Lindsay, 25 Mont. 24.....	64
(Bills of Exception— <i>Mandamus</i> .)	
Morrison v. Jones, 31 Mont. 154.....	33
(Mortgages—Sales Absolute.)	
Mullery v. Great Northern Ry. Co., 50 Mont. 408.....	5
(Personal Injuries—Excessive Verdict.)	
Mullins v. Butte Hdwe. Co., 25 Mont. 525.....	41
(Water Rights—Prescriptive Use—Burden of Proof.)	
(Unrecorded Deed—Notice.)	43
Murray v. Butte etc. Co., 41 Mont. 449.....	33, 276
(Mortgages—Sales Absolute.)	
Mutnal Life Ins. Co. v. Martien, 27 Mont. 437.....	577
(Taxes—Who not Collector of.)	
Nelson v. Great Northern Ry. Co., 28 Mont. 297.....	321
(Common Carriers.)	
Nelson v. Northern Pac. Ry. Co., 50 Mont. 516.....	308
(Contributory Negligence—Pleading.)	
Neuman v. Grant, 36 Mont. 77.....	154
(Costs.)	
Nord v. Boston etc. Min. Co., 30 Mont. 48.....	250
(Nonsuit.)	
Norman v. Corbley, 32 Mont. 195.....	546
(Water Rights—Abandonment.)	
Northern Pac. Ry. Co. v. Carland, 5 Mont. 146.....	466
(Right of Way—Definition.) COMMENTED UPON.	
Northern Pac. Ry. Co. v. Mjelde, 48 Mont. 287.....	425
(Deeds—Reservations—Taxation.)	
(Constitution—Legislative Construction)	464
Noyes v. Black, 4 Mont. 527.....	255
(Trespass.)	
O'Brien v. Corra-R. Island M. Co., 40 Mont. 212.....	408
(Master and Servant—Rules.)	

Ott v. Face, 43 Mont. 82.....	68
(Contracts—Remedies—Election.)	
Parrot S. & C. Co. v. Heinze, 25 Mont. 139.....	184
(Mining Claims—Common-law Rights.)	
Peterson v. City of Butte, 44 Mont. 129.....	14, 15
( <i>Res Judicata</i> .)	
Peterson v. City of Butte, 52 Mont. 13.....	34
( <i>Res Adjudicata</i> —Parties Bound.)	
Pierce v. Great Falls & C. Ry. Co., 22 Mont. 445.....	3
(Carrier and Passenger—Presumptions.)	
Phillips v. Butte etc. Fair Assn., 46 Mont. 338.....	455
(Negligence—Standard of Care.)	
Pigott v. Board of Canvassers, 12 Mont. 537.....	288
(Elections.)	
Poe v. Sheridan County, 52 Mont. 279.....	380
( <i>Mandamus</i> .)	
Rader v. Ervin, 1 Mont. 632.....	277
(Mortgages.)	
Rand v. Butte El. Ry. Co., 40 Mont. 398.....	502
(Instructions.)	
Reynolds v. Fitzpatrick, 23 Mont. 52.....	163
(Mortgages.)	
Riley v. Blacker, 51 Mont. 364.....	279
(Laches.)	
Sears v. Gallatin County, 20 Mont. 462.....	376
( <i>Posses Comitatus</i> —Compensation.)	
Sheldon v. Powell, 31 Mont. 249.....	41
(Water Rights—Prescriptive Use—Burden of Proof.)	
(Unrecorded Deed—Notice) .....	43
Smith v. Denniff, 24 Mont. 27.....	40 <i>et seq.</i> , 545
(Water Rights—Adverse Use—Prescription—Appurtenances.)	
Smith v. Hope Min. Co., 18 Mont. 432.....	546
(Water Rights—Abandonment.)	
Spokane R. & W. Co. v. Beatty, 37 Mont. 342.....	45
(Water Rights— <i>Res Adjudicata</i> .)	
Stadler v. City of Helena, 46 Mont. 128.....	78
(Statutory Construction.)	
State (ex rel. Anaconda C. M. Co.) v. District Court, 25 Mont. 504..	179, 185
(Mining Claims.)	
State (ex rel. Bailey) v. Edwards, 40 Mont. 313.....	568
( <i>Mandamus</i> —Discretion.)	
State (ex rel. B. & M. etc. Co.) v. Clancy, 30 Mont. 193.....	48
(Contempt—Power of District Court.)	
( <i>Habeas Corpus</i> —Nature of Proceeding).....	58
State (ex rel. Bray) v. Settles, 34 Mont. 448.....	97
(Evidence—Good Moral Character.)	
State (ex rel. Breen) v. Toole, 32 Mont. 4.....	288
(Elections.)	
State (ex rel. Bitter R. Dev. Co.) v. District Court, 51 Mont. 305.....	78
(Statutory Construction.)	
State (ex rel. Carleton) v. District Court, 33 Mont. 138.....	459
(Fair Trial Law.)	
State (ex rel. Carroll) v. District Court, 50 Mont. 506.....	61
(Fair Trial Law.)	
State (ex rel. Clarke) v. Moran, 24 Mont. 433.....	291
( <i>Mandamus</i> —Parties.)	

State (ex rel. Cotter) v. District Court, 49 Mont. 146.....	7
(Legislative Procedure.)	
State (ex rel. Donovan) v. Barrett, 30 Mont. 203.....	468
( <i>Mandamus</i> —Discretion.)	
State (ex rel. Finlen) v. District Court, 26 Mont. 372.....	98
( <i>Mandamus</i> .)	
State (ex rel. First T. etc. Bank) v. District Court, 50 Mont. 259.....	458
(Certiorari—Return.)	
State (ex rel. Geiger) v. Long, 43 Mont. 401.....	291
( <i>Mandamus</i> —Parties.)	
State (ex rel. Gnose) v. District Court, 30 Mont. 188.....	459
(Fair Trial Law.)	
State (ex rel. Goodman) v. District Court, 46 Mont. 492.....	62
(Fair Trial Law.)	
State (ex rel. Happel) v. District Court, 38 Mont. 166.....	325
(Default Judgments.)	
State (ex rel. Haskell) v. Faulds, 17 Mont. 140.....	50
(Contempt—Newspapers.)	
State (ex rel. Hepner) v. District Court, 40 Mont. 17.....	59
( <i>Habeas Corpus</i> —Nature of Proceeding.) COMMENTED UPON.	
State (ex rel. Holliday) v. O'Leary, 43 Mont. 157.....	576
(Statutes—Constitutionality—Who may not Attack.)	
State (ex rel. Hurley) v. District Court, 27 Mont. 40.....	368
(District Courts—Costs.)	
State (ex rel. Jackson) v. Kennie, 24 Mont. 45.....	59
( <i>Habeas Corpus</i> —Nature of Proceeding.) COMMENTED UPON.	
(Constitution—Construction) .....	217
State (ex rel. Lohman) v. District Court, 49 Mont. 247.....	459
(District Judges—Disqualification.)	
State (ex rel. Mannix) v. District Court, 51 Mont. 310.....	297
(District Courts—Powers at Chambers.)	
State (ex rel. Marshall) v. District Court, 50 Mont. 289.....	96
(Registration of Nurses.)	
State (ex rel. More) v. District Court, 49 Mont. 577.....	393
(Liquor Licenses—Protest—Procedure.)	
State (ex rel. Newell) v. Newell, 13 Mont. 302.....	60
( <i>Habeas Corpus</i> .)	
State (ex rel. Patterson) v. Lentz, 50 Mont. 322.....	77
(Statutory Construction.)	
State (ex rel. Pool) v. District Court, 34 Mont. 258.....	34
( <i>Res Adjudicata</i> —Parties Bound.)	
State (ex rel. Rowe) v. District Court, 44 Mont. 318.....	373
(Removal of Officers—Nature of Proceeding.)	
State (ex rel. Sell) v. District Court, 52 Mont. 457.....	460
(Fair Trial Law.)	
State (ex rel. Sherman) v. District Court, 51 Mont. 220.....	62
(Fair Trial Law.)	
State (ex rel. Smotherman) v. District Court, 51 Mont. 495.....	325
(Default Judgments—Setting Aside.)	
State (ex rel. Stuewe) v. Hindson, 44 Mont. 429.....	98
(Discretion— <i>Mandamus</i> .)	
State (ex rel. Quintin) v. Edwards, 40 Mont. 287.....	19
(Cities and Towns—Powers.)	
State v. Beeskove, 34 Mont. 427.....	504
(Impeachment of Verdict.)	
State v. Board of Canvassers, 13 Mont. 23.....	288
(Elections.)	

State v. Board of Co. Commrs., 21 Mont. 469.....	291
(Mandamus—Parties.)	
State v. Conrow, 13 Mont. 552.....	220
(Criminal Law—Speedy Trial.)	
State v. Crean, 43 Mont. 47.....	584
(Appeal—Harmless Error.)	
State v. Crowe, 39 Mont. 174.....	338
(Hypothetical Questions—Trial.)	
State v. Cudahy Packing Co., 33 Mont. 179.....	385
(Constitution—Equal Protection of Laws.)	
State v. De Lea, 36 Mont. 531.....	502
(Criminal Law—Reasonable Doubt.)	
State v. Driscoll, 49 Mont. 558.....	373
(Removal of Officers—Nature of Proceeding.)	
State v. Gibbs, 10 Mont. 213.....	503
(Criminal Law—Instructions.)	
State v. Harris, 51 Mont. 496.....	210
(Rape—Evidence of Other Acts.)	
State v. Jones, 48 Mont. 505.....	485
(Evidence—Photographs—X-ray Plates.)	
State v. Keeland, 39 Mont. 506.....	338
(Expert Witnesses.)	
State v. McGowan, 36 Mont. 422.....	502
(Criminal Law—Instructions.)	
State v. Martin, 29 Mont. 273.....	502
(Criminal Law—Reasonable Doubt.)	
State v. Mitton, 37 Mont. 366.....	365
(Promissory Notes—Negotiability.)	DISTINGUISHED.
State v. Peel, 23 Mont. 358.....	338
(Hypothetical Questions—Procedure.)	
State v. Penna, 35 Mont. 535.....	140
(Instructions.)	
State v. Quantic, 37 Mont. 32.....	41
(Water Rights—Prescription.)	
State v. Vinn, 50 Mont. 27.....	560
(Criminal Law—Defective Information.)	
State v. Wakely, 34 Mont. 427.....	504
(Impeachment of Verdict.)	
Stephens v. Conley, 48 Mont. 352.....	101
(Malicious Prosecution—Pleading and Proof.)	
Swain v. McMillan, 30 Mont. 433.....	276, 277
(Deeds Absolute—Mortgages.)	
Sweetland v. Olsen, 11 Mont. 27.....	43
(Real Property—Appurtenances.)	
Talbott v. Butte City W. Co., 29 Mont. 17.....	44
(Water Rights—Adverse Use.)	
Territory v. McAndrews, 3 Mont. 158.....	502
(Criminal Law—Reasonable Doubt.)	
Territory v. Murray, 7 Mont. 251.....	48
(Contempt—Power of District Court.)	
Tiggerman v. City of Butte, 44 Mont. 138.....	5, 483
(Personal Injuries—Minimizing Damages.)	
Titus v. Anaconda C. Min. Co., 47 Mont. 583.....	407
(Master and Servant—Duty of Latter to Obey.)	
Tucker v. Jones, 8 Mont. 225.....	43
(Real Property—Appurtenances.)	
Turk v. Rudman, 42 Mont. 1.....	68
(Contracts—Breach—Remedies—Election.)	

United States v. Fox, 3 Mont. 512.....	220
(Criminal Law—Speedy Trial.)	
Vantilburgh v. Black, 3 Mont. 459.....	31
(Equity—Jurisdiction.)	
Van Vranken v. Granite County, 35 Mont. 427.....	478
(Nonsuit.)	
Vreeland v. Edens, 35 Mont. 413.....	230
(New Trial—Harmless Error.)	
Wade v. Lewis & Clark County, 24 Mont. 335.....	376
(County Surveyor—Compensation.)	
Wall v. Northern Pac. Ry. Co., 50 Mont. 122.....	321
(Common Carriers.)	
Wallace v. Chicago etc. Ry. Co., 48 Mont. 27.....	350
(Cited.)	
Western L. & S. Co. v. Smith, 42 Mont. 442.....	82
(Varying Terms of Written Contract.)	
White v. Chicago etc. Ry. Co., 49 Mont. 419.....	5
(Personal Injuries—Excessive Verdicts.)	
(Appeal—Harmless Error).....	513
Willoburn Ranch Co. v. Yegen, 49 Mont. 101.....	478
(Complaint—Sufficiency.)	
Wilson v. Harris, 21 Mont. 374.....	31
(Equity—Jurisdiction.)	
Yellowstone Park R. R. Co. v. Bridger C. Co., 34 Mont. 545.....	516
(When Verdict Conclusive.)	
Yergy v. Helena L. & Ry Co., 39 Mont 213.....	478
(Nonsuit.)	







